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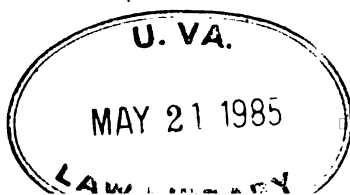
VOL. II.

A
TREATISE
ON THE
LAW OF MARINE INSURANCE
AND
GENERAL AVERAGE.

BY
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IN TWO VOLUMES.
VOL. II.

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THE LAW OF MARINE INSURANCE.

CHAPTER I.

OF DEVIATION.

SECTION I. — *What is meant by Deviation.*

THE basis upon which the contract of insurance, and all the law regulating that contract, rest, is, that the insurers agree to indemnify the assured against certain perils, in consideration of a premium paid by the insured, and, that the contract may be fair between the parties and useful to the commercial public, it is obvious that this premium must be adequate, or in due proportion to the risks. This, however, is impossible, unless the risks can be to a certain extent known beforehand, and therefore estimated. For this purpose, the voyage, where the insurance is upon a voyage, must be distinctly stated; and, its course and termini being known, the insurers may then judge of the risks to be encountered on that voyage. If, however, the insured is to be at liberty to vary the voyage at his own pleasure or convenience, it is plain that he may vary the risks in the same, and then that the estimate of the insurers must be of no use. It is, therefore, a perfectly well-established rule of law, that the vessel must not *deviate from the proper course of the voyage*. But the principle on which this prohibition rests extends to all other things which enter as elements into the calculation that determines the amount of premium. The result of this is, that although "deviation" in the law of insurance originally meant, no doubt, only a departure from the course of the voyage, it is now always understood in the sense of any material departure from, or change in, the risks insured against, without just cause. In a recent case in Pennsylvania it

was held that the risk insured against must not be changed by the manner of conducting the voyage, and that the risk is changed, if, without a necessity arising from a danger insured against, the usual manner of conducting the voyage is changed. It was further held that a party procuring insurance on a voyage to be conducted in a prescribed mode is to be understood as stipulating that that particular mode is practicable and will be followed, and that he has no insurance if the mode is not practicable at a particular stage of water, and he attempts it then. The insured has no right to change the terms of the policy by starting at a time that makes the change necessary. The only change which justifies a deviation as one of necessity is one arising from a cause discovered after the beginning of the voyage.¹

Nor is it necessary, to constitute a deviation, that the change in the risks should be an increase of them; it is enough that the parties have agreed that the insurers shall assume certain risks, and no others; and the insured have no right to substitute any others in the place of those assumed, whether they be greater or smaller.²

¹ *Merchants' Ins. Co. v. Algeo*, 32 Penn. State, 330. In this case a policy of insurance was effected on an ice-boat from Freeport to Nashville, "to be brought down to Pittsburg by sweeps, and to be towed thence by steamboat." The pilot, instead of stopping at Pittsburg, proceeded to a landing about three miles below, in pursuance of a previous determination, and not to escape any danger insured against; before arriving at which the boat was lost by perils of the river. Held, that this was a change in the voyage insured, and discharged the underwriters.

² In *Maryland Ins. Co. v. Le Roy*, 7 Cranch, 26, the vessel had liberty to touch at the Cape de Verd Islands for the purchase of stock, such as hogs, goats, and poultry, and taking in water. The judge in the court below instructed the jury, that the taking in of four jack-
oes did not avoid the policy, unless the risk was thereby increased. The jury

having found for the plaintiffs, the judgment was reversed on account of the above ruling. Mr. Justice *Johnson* said: "The discharge of the underwriters from their liability in such cases depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance. The consequences of such violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters, and the law attaches no importance to the degree, in cases of voluntary deviation." And Lord *Mansfield*, C. J., in a case where a ship had been turned into a factory-ship for the slave-trade, said, in substance: The single point here is, whether there has not been what is equivalent to a deviation,—whether the risk has not been varied. It is not material whether or not the risk has been greater. If a ship insured for a trade is turned into a floating warehouse, or a factory-ship, the

For example, if goods are transshipped from one vessel to another, this is a change of risk, which discharges the insurers, without inquiry whether the new vessel be better or worse than the old one.¹ In practice, however, it is generally true, as the cases in our notes to this chapter will show, that a slight change, which does not increase the risk, is not considered a deviation.

Nor is the question, whether such a change is a deviation or not, that is, whether it proceeded from a sufficient cause or not, to be judged of by the event. For this might show that no necessity really existed, although any prudent man would have believed at the time that circumstances required or compelled the change that was made, and therefore the deviation was justified; or, it might make it evident, that a change, for a cause altogether too slight to justify it, did in fact, from circumstances not known or considered, save the vessel from great but unknown dangers. The rule, therefore, is, that the necessity for the change, or the justification of it, must be judged of and determined by the circumstances of the case, as, at the very time, they came or could

risk is different, it varies the stay, for while she is used as a warehouse no cargo is bought for her. *Hartley v. Buggin*, 3 Doug. 39. See also *Child v. Sun Mutual Ins. Co.*, 3 Sandf. 26.

So, where a vessel, insured from Gibraltar to the United States, with liberty to proceed to the Cape de Verd Islands for salt, arrived at the Isle of May, and found that there were so many vessels waiting, that her turn to load would not come for several weeks, but the governor of the island proposed that the captain should make a voyage to two of the other islands for provisions, and should load immediately on his return. This was done, and the vessel was loaded sooner than would otherwise have been the case. The intermediate voyage was, nevertheless, held to be a deviation. *Kettell v. Wiggin*, 13 Mass. 68. See also *Robertson v. Col. Ins. Co.*, 8 Johns. 491.

¹ *Emerigon*, c. 12, § 16 (*Meredith's*

ed.), 339; *Bold v. Rotheram*, 8 Q. B. 797; *Paddock v. Commercial Ins. Co.*, 2 Allen, 93. And in *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7, 20, where part of the cargo insured was taken out and sold under pretence that the ship was overladen, and a lighter cargo bought and put on board, Mr. Justice *Washington* said: "The changing of the cargo was sufficient to avoid the policy, if, under the circumstances of the case, it were imputable to the plaintiff. The reason is not, that the risk insured is increased, but that it is not the risk insured; and therefore it could be no excuse to say, that the load was lightened by the change. If a necessity exists to throw overboard or to land a part of the cargo, the act of doing so may be excused, but in this case there is no evidence of any necessity to lighten the vessel." See also *Phoenix Ins. Co. v. Cochran*, 1 P. F. Smith, 143.

come before the consideration of the assured or his representative.¹

As deviation now means more than a change in the course of a voyage, there may be a deviation while the ship is in port;² or where the insurance is on time, no voyage being indicated.³ And as the reason of this rule applies to all navigation, so does the rule itself, and the law of deviation is in full force in reference to all river and lake navigation.⁴

¹ *Byrne v. La. State Ins. Co.*, 19 Mart. La. 126; *Gazzam v. Ohio Ins. Co.*, Wright, 202. And in *Stewart v. Tenn. Mar. & F. Ins. Co.*, 1 Humph. 242, it was held, that though generally it would be a deviation to lash a flat-boat, descending the Mississippi, laden with produce, to a steamboat to be towed, yet, if the flat-boat had been damaged by a collision, and the master, believing the danger to be imminent, should cause his boat to be taken in tow, although this enhanced the danger and contributed to the loss, if it was honestly intended by the master for the preservation of the boat, the underwriters were liable. The same principle was established in *Gazzam v. Ohio Ins. Co.*, *supra*, where a steamboat, while being moved from a wharf to her landing place, by a line and yawl, steam not being up, was struck by a sudden flaw of wind and thrown upon some rocks. The court held, that, if there was a usage in respect to the mode of moving a steamboat from one wharf to another, the master was bound to follow it, and a variation from it would be a deviation; but if there was no usage, and the master acted honestly in moving the boat in the manner described, it was no deviation, though other masters, of equal ability and fairness, stated that they would have acted differently under the same circumstances.

² *Gazzam v. Ohio Ins. Co.*, Wright, 202. See also note, *supra*. In — *v. Westmore*, 6 Esp. 109, the vessel was insured "during one month's remaining in Portsmouth Harbor, securely moored." The vessel was moved twice. Lord *Ellenborough* held, that this did not change the risk. So, in *Bell v. Western Mar. & F. Ins. Co.*, 5 Rob. La. 423, where the marshal of a court in which the vessel had been libelled removed her from one side of the river to the other, and there kept her, the underwriters were held liable, there being no proof that the risk was at all increased.

³ See cases in the preceding note. In *Stuart v. Columbian Ins. Co.*, 2 Cranch, C. C. 442, a vessel was insured for six months, and described in the policy as "now bound on a voyage from Georgetown to Madeira and a market between Finisterre and Naples, with liberty, after the expiration of six months, to freight or trade for six months more," at an additional premium. Held, that the policy for the second six months was on time only, and that the vessel had a right to go to Brazil during that time.

⁴ *Hermann v. Western Mar. & F. Ins. Co.*, 13 La. 516; *Gazzam v. Ohio Ins. Co.*, Wright, 202; *Jolly v. Ohio Ins. Co.*, Wright, 539; *Bell v. Western F. & M. Ins. Co.*, 5 Rob. La. 423; *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. 340.

SECTION II.—*Of the Effect of a Deviation.*

It is perfectly well settled, that any deviation whatever discharges the insurers from all further responsibility; leaving them, however, liable for any loss occurring before the deviation, and caused by a peril insured against.¹ Nor are they discharged, if the change of risk is merely temporary, and, when it ceases, all subsequent risks are precisely and certainly the same as they would have been had no deviation taken place. In this case, the effect of the deviation is only to suspend the responsibility of the insurers, and discharge them from any liability for a loss which occurs during the existence of the deviation. But it is obvious that there are very few changes of risks that can be said to leave all the subsequent perils in precisely the same condition as if there had been no change; and this exception, therefore, is seldom applicable.²

In a recent case in Missouri, this question is considered or implied. A time policy was issued upon a steamboat on time. There was an express exception of the navigation of certain waters. After the issue of the policy, the boat made a trip upon the excepted waters, and returned safely to port, and while in port was destroyed by fire. The court held that the insurers were liable, reversing the judgment of the court below.³

¹ *Hare v. Travis*, 7 B. & C. 14; *Richardson v. Maine F. & M. Ins. Co.*, 6 Mass. 102.

² Mr. Justice *Sedgwick*, in delivering the opinion of the court, in *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 486, 449, said: "It is undoubtedly true, that the shortness of the time, or the distance of a deviation, makes no difference as to its effect on the contract. Whether for one hour or one month, or for one mile or one hundred miles, the consequence is the same. If it be voluntary and without necessity, it puts an end to the contract." It would seem, however, that there may be a temporary deviation, which would exonerate the underwriters for loss during such deviation,

but not for a subsequent loss. Thus, if a steamboat which makes regular trips between two ports is insured for one year, and if, after the trip for the day is ended, she should tow a vessel or do any other similar act, the underwriters might be liable if she were subsequently lost on a regular trip or while lying in port, although not if she were lost while engaged in towing.

³ *Greenleaf v. St. Louis Ins. Co.*, 37 Missouri, 25. *Wagner, J.*, says: "The words without the exception would embrace all the tributaries of the above-mentioned river. The exception has the effect of restraining or suspending the liability of the underwriter in a certain event. If the intention had

SECTION III. — *What is a Deviation from the Proper Course of a Voyage.*

THE deviation which is most usual is a departure from the proper course of the voyage; and that is the most proper course which is the usual course, if there be a usage in this respect. This is a question of fact. No master of a ship is bound to go just where one, two, or three who have preceded him chose to go. Nor is he, indeed, entitled to do this, if it be out of the direct course of the voyage.¹ But if the usage is made out, it will justify the departure.² The criterion is this: Has the customary course of ships on that particular voyage been so long established and so well known, that the insurers are justified in calculating upon that course as the one the ship will, if possible, pursue? If there be no such usual course, then the master is bound to proceed to the destined terminus in the most natural, direct, safe, and advantageous way.³

been that the policy should be defeated on any of the excepted rivers, that intention would have been expressed. This is not like the case of *Stevens v. Conn. Mut. Ins. Co.*, 6 Duer, 594. There the policy of insurance on which the action was founded contained a warranty, that the vessel insured should not use any port or ports in the Gulf of Mexico, and there was a breach of the warranty on the part of the assured."

¹ *Martin v. Delaware Ins. Co.*, 2 Wash. C. C. 254. See also *Folsom v. Merchants' Mut. Mar. Ins. Co.*, 38 Maine, 414.

² *Bentaloe v. Pratt*, J. B. Wallace, 58; *Kettell v. Wiggin*, 13 Mass. 68. So a vessel, on whose cargo insurance has been made, may stop in descending a river for the purpose of taking in further cargo, or passengers, if such stoppages are conformable to the usages of trade, and are of no unusual length. *Lockett v. Merch. Ins. Co.*, 10 Rob. La. 339. But a usage of this nature seems

to have been disregarded in *Eliot v. Wilson*, 4 Brown, P. C. 470. In *Mey v. South Carolina Ins. Co.*, 3 Brev. 329, the underwriters refused to insure a vessel at and from Amsterdam, but afterwards insured it from Amsterdam. It was then the custom of vessels of a certain tonnage to take in part of their cargo at Amsterdam, and the rest at the Texel, one hundred miles distant. The vessel sailed from Amsterdam, but while lying in the Texel, waiting for cargo, was damaged by a storm, and the underwriters were held liable.

³ *Martin v. Delaware Ins. Co.*, 2 Wash. C. C. 254. The voyage in this case was "at and from Kingston, in Jamaica, to the island of Aruba, and at and from thence back to Kingston, with liberty to touch at Rio de la Hache." Permission was afterwards given to take in the whole or any part of the cargo at Coro. The vessel sailed for and arrived at Aruba, sailed thence for Coro, took in part of her cargo, and then returned

If a reasonable usage requires that a master, on reaching a certain point, should then and there decide, on consideration of the wind and currents and other circumstances as then existing, which of two or more routes is the best, and he, without so deciding, takes one of them in obedience to the sailing orders of his owners, this would be a deviation. For the insurers have not only a right to this exercise of his judgment, but a right to consider, when they estimate the risk, that he will be in entire liberty when he reaches that point to take what seems the best course.¹

It must not be inferred, however, that if a master honestly mistakes the course, when one is marked out by usage, that is never a deviation. For where there is a course so prescribed and defined, the assurers have a right to require that the master shall know it, and shall follow it.² But if no course be in this way determined,

to Aruba, and was captured while in that port. Held, that the return from Coro to Aruba was a deviation. So, where a vessel, on a voyage from one port to another, puts into an intermediate port. *Fox v. Black*, Park, Ins. 387; *Townson v. Guyon*, Park, Ins. 388; *Salisbury v. Townson*, Millar, Ins. 418, Park, Ins. 411. And in *Brown v. Tayleur*, 4 A. & E. 241, 5 Nev. & M. 472, where a vessel, insured "at and from her port of lading in North America to Liverpool," took in part of her cargo at Cocagne, New Brunswick, and then sailed to Buktouche, seven miles distant, and not in a line from Cocagne to Liverpool, where she took in the rest of her cargo, then returned to C., took in her stores and sailed for L., the voyage from C. to B. was held to be a deviation. Both of these ports were within the jurisdiction of the customhouse at St. Johns, New Brunswick.

¹ *Middlewood v. Blakes*, 7 T. R. 162. See this case stated at length, *ante*, Vol. I. p. 487, n. 1.

² *Phyn v. Royal Exch. Ass. Co.*, 7 T. R. 505. In this case, the jury found

that the deviation was owing either to the ignorance of the captain, or to something else, but that it was not fraudulent. Held, that the underwriters were not liable. This question was much considered in the case of *Brazier v. Clapp*, 5 Mass. 1. The vessel was insured on a voyage from Boston to New Orleans, and back. It appeared by the log-book, that, when the ship was up with Cape Cod, the captain ordered the ship to be hauled up for Nantucket, intending to go through the Vineyard Sound. It was proved at the trial, and the jury so found, that the usual route was by the South Channel. The judge charged, that, if there had been a departure from the usual course, they should find whether it was from necessity or mistake, in either of which cases they should find for the plaintiff. The jury being unable to agree, they were further instructed, that they should find merely whether the deviation was through necessity. A verdict being rendered for the defendants, the plaintiff excepted. In delivering the opinion of the court, *Sedgwick, J.*, said: "A

then they can only require that the master shall find, as well as he can, what is the proper course, that is, the most direct course that is safe; and if he takes the course which he judges to be this, it is no deviation, although he ought to have judged differently. If, indeed, he wanders so widely, that no master of ordinary skill, sense, or knowledge could have done so, this is a deviation; because it would be beyond those limits of choice and reasonable possibility which the insurers had a right to contemplate in calculating the risks upon an unusual voyage.

As touching at a port, not in the course of the voyage, is a deviation, so, *a fortiori*, is an intermediate voyage;¹ but a usage may exist which will justify either of these things.² This has been well illustrated in a recent case in New York. The voyage was described as at and from Santa Martha on the Main to New York, with liberty of touching at two other ports. Liberty was afterwards given of performing a voyage from Santa Martha to Chagres, and back to Carthagena, and also to use three additional ports on the voyage from the Spanish Main to New York. The vessel used six ports on the Main before she sailed for New York. It was shown to be the usage for vessels to visit different ports on the Main, and then sail for home without touching at any ports on the way. The court held that the voyage was referred to as a whole from Santa Martha to New York, that the word

general position, that the mistake of the captain, under no circumstances, forms an excuse for a deviation, is certainly not true. The most skilful, discreet, and prudent master may, and probably in almost all long voyages does, commit mistakes, by which his ship may be taken out of the most direct and shortest course. Such is not a deviation that will discharge the underwriters. On the contrary, I believe that in all instances, where a captain of ordinary skill and discretion forms the best judgment he can under the existing circumstances, for the interest of all concerned, the contract of insurance remains unimpaired by his pursuing that judgment. But in this case, before the

charge of the judge was given, of which the plaintiffs complain, it was ascertained by the jury that the route pursued was not the usual course, and that it was less safe than that which was departed from; and this at the commencement of a voyage, when every necessary information might be easily obtained." The verdict for the defendants was accordingly sustained.

¹ Kettell v. Wiggan, 13 Mass. 68.

² As in the Newfoundland trade. Vallance v. Dewar, 1 Campb. 503; Ougier v. Jennings, 1 Campb. 505, n. So, in the East Indian. Salvador v. Hopkins, 3 Burr. 1707; Gregory v. Christie, 3 Doug. 419; Farquharson v. Hunter, Park, Ins. p. 67.

"from" did not necessarily exclude ports on the Main, and that by the course of trade they were included.¹

Even a slight deviation, or what might seem to landsmen a very slight deviation, may suffice to discharge the insurers, as many cases show. Doubtless, the common rule, that the law *de minimis non curat*, would apply here as elsewhere. But if it be a deviation for a vessel to go designedly and unnecessarily an hour out of her course, or to lie by a ship for that time, only to save endangered property, it is obvious that any *actual and substantial* change of risk is a deviation, although it be a very small one.²

An unreasonable and unnecessary delay in commencing a voyage, where the risk begins with the sailing of the vessel from the port,³ or a similar delay in port, where the insurance is "at and from" a port,⁴ and the risk has commenced, or an unusual, ex-

¹ *Depeyster v. Sun Mut. Ins. Co.*, 19 N. Y. 272.

² See *ante*, p. 5, n: 2, and *post*, in regard to saving property.

³ Where the insurance was "from" a port, it was held, that a delay of six months after the policy was made, it not appearing that the vessel was detained by fraud or any sinister design, nor that the risk was thereby enhanced, was not a deviation, the jury having found that the delay was not unreasonable. *Earl v. Shaw*, 1 Johns. Ca. 313. But see *Hinely v. S. Car. Ins. Co.*, 3 Const. R. 154. In *Driscoll v. Passmore*, 1 B. & P. 200, a vessel having sailed on a voyage from Lisbon to Madeira, from Madeira to Saffi on the coast of Africa in ballast, and from thence back to Lisbon, a policy of insurance on the freight of the voyage from Saffi to Lisbon was obtained on the representation that the vessel had arrived at Madeira and was about to proceed on her voyage immediately. On the arrival of the vessel at Madeira, all the crew except two, being alarmed by reports that some Moorish cruisers were off Saffi, left the ship and refused to

return, unless the captain would sail immediately for Lisbon. On the arrival of the vessel at Lisbon, the charterers insisted on the captain's proceeding directly to Saffi, which he did, and the vessel was lost on the return voyage from Saffi to Lisbon. The underwriters were held liable.

⁴ *Chitty v. Selwyn*, 2 Atk. 359; *Hull v. Cooper*, 14 East, 479; *Hartley v. Buggin*, 3 Doug. 39; *Seamans v. Loring*, 1 Mason, 127; *Himely v. S. Car. Ins. Co.*, 3 Const. R. 154; *Palmer v. Marshall*, 8 Bing. 79. In this case, insurance was effected on the yacht *Ruby*, "at and from Bristol to London." The policy was dated Jan. 28, 1831. The yacht remained at Bristol till the 17th of the following May, when she commenced her voyage. The plaintiff was nonsuited, on the ground that the delay to sail amounted to a deviation or variance of the risk. On a motion for a new trial, 8 Bing. 317, *Tindal, C. J.*, said: "What I have to consider, therefore, is whether any facts have been stated by the plaintiff to account for this delay. I find none suggested, beyond the circumstance that this vessel was de-

traordinary, and unnecessary extension or protraction of a voyage, either at sea or in a foreign port, is a deviation, because it is certainly a change, and indeed an increase of the risk.¹ And, if

scribed as a yacht upon the policy, and that yachts are usually laid up in winter. But if the plaintiff meant to rely on that, he should have taken a policy adapted to his purpose. He might have insured his vessel in port for a definite time, and on the voyage to be commenced afterwards." In a subsequent action against another underwriter on the same policy, *Palmer v. Fenning*, 9 Bing. 460, it appeared, in addition to the facts above stated, that at the date of the policy, and subsequently, the yacht was put up for sale at Bristol, and that the master proceeded from London to Bristol and fitted out the vessel for the voyage a few days only before she sailed. The jury found for the plaintiff, on the ground that the delay was reasonable, as yachts did not usually sail in winter. The verdict was set aside and a new trial granted, on the authority of *Palmer v. Marshall*. See also *Mount v. Larkins*, 8 Bing. 108. In this case, the insurance was on a vessel "at and from Sincapore to the ship's port of discharge in Europe." Owing to a delay on the outward voyage to Sincapore, she did not arrive at that port till the 30th of March, and sailed from thence on the 3d of May. The jury found that there was unreasonable and unjustifiable delay between the making of the policy and the commencement of the risk. It was therefore held, that the underwriters were discharged. This case is cited and the doctrine approved of by *Parke, B.*, in *Small v. Gibson*, 16 Q. B. 141, 3 Eng. L. & Eq. 299, 306.

¹ *Hamilton v. Sheddon*, 3 M. & W. 49. The jury found, in this case, that

a delay of thirteen months at Benin, in Africa, was unreasonable, and the court refused to set the verdict aside. See *Murden v. South Carolina Ins. Co.*, 3 Const. R. 200; *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 436. In *Williams v. Shee*, 3 Campb. 469, goods on board a vessel were insured "at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods, without being deemed a deviation." The vessel sailed with a fleet under convoy. On arriving at Madeira, she put in there to land some goods, and was detained till after the convoy sailed, and was subsequently captured. Held, that this was a deviation. So, if a vessel which has been captured remains, after her release, in the port to which she has been carried by her captor longer than is necessary to prepare for her voyage, this is a deviation. *Kingston v. Girard*, 4 Dall. 274. In *Inglis v. Vaux*, 3 Campb. 437, the ship was insured at and from Liverpool to Martinique, and all or any of the windward islands. Most of the outward cargo was disposed of at Martinique; with the rest, the captain sailed for Antigua, where he remained eight days, partly to dispose of the outward cargo, and partly to procure a homeward one. Lord *Ellenborough, C. J.*, held, that, as soon as the disposal of the outward cargo ceased to be the sole reason of his stay at Antigua, the underwriters were discharged. But if the delay had not been increased by the endeavor to procure a homeward cargo, we think it clear that the underwriters should

goods are insured until safely landed, an unusual and unnecessary delay in discharging them will exonerate the insurers.¹ But the mere lapse of time is no proof of such a deviation. It enters importantly into the question, and is, indeed, the basis of it. But this question is, as in all cases of deviation: Has there been any voluntary, extraordinary delay, not justified by necessity, or some cause equivalent to necessity?²

have been held responsible. In *Upton v. Salem Comm. Ins. Co.*, 8 Met. 605, 611, Mr. Justice *Wilde*, speaking of this case, said: "For aught that appears in the report of the evidence, the remnant of the outward cargo might have been disposed of immediately on the arrival at Antigua, if the vessel had not been detained for the purpose of procuring a homeward cargo. On no other principle can the decision in that case be maintained." In *Warre v. Miller*, 4 B. & C. 538, 7 Dow. & R. 1, insurance was effected on freight, at and from Grenada to London. The vessel sailed, and arrived at Grenada, discharged part of her cargo at three different bays, and was going to the fourth to discharge the remainder, and to take in part of her homeward cargo, when she was lost. The underwriters were held liable.

If the insurers know that the vessel they are insuring is to sail in company with another, and that they are not equally fast sailors, the vessel insured may delay a reasonable time for the other, if they are separated on the voyage. *Coles v. Marine Ins. Co.*, 3 Wash. C. C. 159.

¹ *Parkinson v. Collier*, Park, Ins. 416. See *Noble v. Kennoway*, 2 Doug. 510.

² *Langhorn v. Allnutt*, 4 Taunt. 511; *Cleveland v. Union Ins. Co.*, 8 Mass. 308, 318. In *Grant v. King*, 4 Esp. 175, insurance was made on an American vessel, at and from Brest to London, against British captures. The policy was taken out in August, but the vessel

did not sail till the month of March following. The port of Brest was blockaded by an English squadron, and the master was obliged to go to London to procure American sailors to navigate the vessel. The underwriters were held liable. Lord *Ellenborough* said: "To discharge the policy, there must be a clear imputation of waste of time. Mere length of time lapsing between the sailing of the vessel and the underwriting of the policy is not of itself sufficient to avoid the policy; it is capable of explanation." So where the insurance was "at and from Pillau," and the vessel arrived there in an unseaworthy condition, and was detained some time for repairs. *Smith v. Surridge*, 4 Esp. 25. Lord *Tenterden*, in *Bain v. Case*, 3 Car. & P. 496, left it to the jury to decide whether the delay of one hundred and nine days in port was unreasonable, the captain having stated that he remained there with the hope of getting permission to land his cargo, as negotiations were then pending with the government for that purpose. In *Suydam v. Mar. Ins. Co.*, 2 Johns. 138, a delay of twenty days at the port of destination, for permission to enter, was held not unreasonable, the master having reason to believe that a permission to enter would be granted. In *Col. Ins. Co. v. Catlett*, 12 Wheat. 383, *Story, J.*, said: "A delay which is necessary to accomplish the objects of the voyage, according to the course of the trade, if *bona fide* made, cannot be admitted to

Going into a port which did not belong to the established or the natural and proper voyage is certainly a deviation, and, in

avoid the insurance." And it was held, that a delay for the purpose of selling the cargo was not a deviation, although the delay was owing to the master being instructed not to sell the cargo at less than a specified price. But, said *Story, J.*: "If the owner should limit the price to an extravagant sum, or the master should delay after all reasonable expectations of a change of market were extinguished, such circumstances might properly be left to a jury to infer a delay amounting to a deviation." And in *Gilfert v. Hallet*, 2 Johns. Ca. 296, a delay of nineteen weeks for the purpose of selling the cargo, and the remaining three days off another port to inquire about a market, were held not to be deviations. So in *Phillips v. Irving*, 7 Man. & G. 325, where the ship was insured "at and from London to Bombay, and thence to China, and back to the United Kingdom, with liberty to touch, stay, and trade at all ports and places on this side, at or beyond the Cape of Good Hope," a delay of seven months was held not to be unreasonable, under all the circumstances of the case. The first three months were taken up in getting the vessel repaired. The rest of the time was occupied in seeking for a cargo, which could not be obtained. *Tindal, C. J.*, delivering the opinion of the court, said: "It may be collected from numerous cases, that delay before or after the commencement of a voyage insured is not equivalent to a deviation, unless it be unreasonable. And we think that no certain and fixed time can be said to be a reasonable or unreasonable time for seeking a cargo in a foreign port; but that the time allowed must vary with the varying circumstances, which may

render it more or less difficult to obtain such cargo." In *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, insurance was effected "at and from Baltimore to Barcelona, and at and from Barcelona back to Baltimore." A usage of trade was proved, that vessels might take in part of their cargoes at Barcelona, and then go to Salou, about sixty miles further south, and take in the rest. The majority of the court were of the opinion, that, although the vessel might remain at Barcelona during the time usually employed in loading a cargo, yet, when this time was exhausted, she could not sail for Salou.

And a delay of five months to claim a cargo, which had been seized by government, was held not to be a deviation. *Stocker v. Harris*, 8 Mass. 409. And, in another case, where the master, being directed to take his vessel into the king's dock at Deptford, moored her near the dock gates, and, no order for her admission being received, remained there from the 18th to the 27th of February. The order for admission arrived on the 21st. The jury having found that the delay was not owing to the fact that the order for admission was not received before, but was caused by a quantity of ice in the river, the underwriters were held liable. *Samuel v. Royal Exch. Ass. Co.*, 8 B. & C. 119.

In *Schroder v. Thompson*, 7 Taunt. 462, 1 J. B. Moore, 163, a vessel was chartered on a voyage to Norfolk, in Virginia, with liberty to call at St. Ubes and take in a cargo of salt, and to bring home a return cargo of timber. She entered Norfolk, with the salt on board, during an embargo, under which permission was given to return with the

fact, a very common one. So is the entering into a port which does belong to the voyage, but, by the usual course of it, should not have been entered at that time or in that order. The questions which cases of this kind usually present are these: In the first place, did the port belong to the voyage, according to either the established usage or the reason of the thing? If it did not, was the entering into it for a good and sufficient cause? In the next place, if the port did belong to the voyage, in what order or succession, as to other ports, did this come, if the voyage required that it should be entered?

In a recent case in Massachusetts, the whole subject was considered. A vessel was insured from New York to ports in South America, and thence to ports of discharge in the United States, with an indorsement thereon of "liberty to deviate by going to port or ports in Europe, by paying an equitable premium therefor." She sailed from New York to South America, and at Rio Janeiro she was chartered to take coffee to Malta and Constantinople; from this port she went to the Crimea, and then from Constantinople she went to Smyrna "seeking business," and thence sailed with a cargo for Boston, and was lost on our coast. The plaintiffs rested their case mainly on evidence of an established usage, whereby a vessel under such a liberty is permitted to make intermediate voyages between any ports in that quarter of the globe which she has leave to visit. It was, however, held that such a policy covers one round voyage, with the ports which belong to it, but does not include a distinct and independent voyage, having no connection with the general objects and purposes of the voyage insured,¹ and that no such usage as that which it was attempted to prove could be permitted to affect the construction of the policy. The plaintiffs also offered to show that, in conversation with the defendants' agent, he was informed that the vessel might take such a course as she did in fact, and that the agent said the phrase "ports in Europe" would cover such a voyage. But the evidence was not received.

In a late case in New York, a somewhat similar question as to

cargo which she then had on board, or in ballast. The captain, however, remained there eighteen months, till the embargo ceased, then shipped his home-

ward cargo, sailed, and was lost. The underwriters were held liable.

¹ *Seccomb v. Provincial Ins. Co.*, 10 Allen, 305; opinion by *Bigelow*, C. J.

the voyages covered by a policy came up for consideration. The insurance was on freight and on time. The policy contained a written clause, limiting the voyage to which the insurance was to attach in these words: "To be confined to the trade between Atlantic ports of the United States, or the ports of London, Liverpool, and Havre, and the Pacific Ocean, China Seas, including Australia, Van Dieman's Land, and ports in the Indian Ocean." It contained no other description or limitation of the voyage or voyages covered by the policy. At the time of making the insurance in question, the vessel, freight of which was insured, was on a voyage from Singapore to Bombay; from thence she sailed to Liverpool, discharged her cargo, and took on board a new cargo for New York, for which place she sailed, and during the voyage thitherward she was lost. The court held that the insurance did not, as matter of law, extend to this voyage made by the vessel in question from Liverpool to New York.¹

¹ *Mallory v. Commercial Ins. Co.*, 9 Bosw. 101, opinion by *Robertson, J.*: "It is plain, from the language of the written clause of the policy in question, which determines the employment of the vessel whose freight is the subject of insurance therein, that such employment is controlled by a trade and not mere voyages. A trade between places comprehends voyages between them, but may include something more, especially when so wide a latitude is given to its boundaries as the principal ports in the United States and Europe, and the Pacific and Indian Oceans, and China Seas. The principal if not only embarrassment, in interpreting the clause in question, arises from the difficulty of determining whether a single trade or two trades are described in it. Two different trades, one between the United States Atlantic ports and the Pacific and other oceans spoken of in such clause, and the other between the therein designated European ports and the same oceans, may be known to

dealers in insurance; *Coit v. Comm. Ins. Co.*, 7 Johns. 385; or there may be but one kind of trade in which the same oceans may furnish one of the *termini* of the voyages in such trade, and the same American or European ports indiscriminately the other; and the word 'trade,' in the singular, may have been employed for that reason. It would also be possible that the course of trade might permit a reinvestment in Europe of the proceeds of a cargo brought from Asia to Europe, in a cargo for the American market, so as to preserve the continuous unity of the trade; or it might be only necessary and sufficient, for the same purpose, to bring to the United States part of the cargo shipped in Asia after landing another part in Europe; or, *vice versa*, the reinvestment in Europe of the proceeds of a cargo brought from America in a cargo suited to the Asiatic market, or a reservation of a part of it for the final port, might still keep the adventure single, or a round voyage. The court, how-

It has been recently held that it is not a deviation for a vessel driven into a port by stress of weather to proceed in good faith for repairs to a neighboring port where her owners reside, although she might have been repaired at the first port.¹

ever, cannot take judicial notice of the character of such trade or trades; *Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26; and no evidence was furnished on the trial relating to them; indeed, the defendant was precluded from introducing any evidence on the subject. On the other hand, the plaintiffs did not introduce any evidence, either to show that the loss occurred in any special trade, or to sustain the allegation in the complaint, that a trade between each and all of the places or ports named in the policy was usually designated by the terms employed therein. They rest their right to recover, therefore, solely on the position that the word 'or,' which creates an alternative, is to be read 'and' (or rather, perhaps, as there is a subsequent copula, be actually omitted), and then, voyages between any of the places and ports named and any other of them are to be assumed as intended by 'the trade' between them; and they claim that without such a change the clause would be insensible and void, because it contains an alternative without the means of determining it. I do not perceive that the proposed change of substituting 'and' for 'or,' or even dropping the last altogether, without some other change, would materially aid the plaintiffs without some other change, as there are no less than three other 'ands' in the sentence, which seriously affect its construction; that one which connects

the three named European ports together, literally construed, requires the particular trade to be conducted by voyages between all those ports and any other named place; while the last one would require the trade to be conducted by voyages between the Pacific Ocean, China Seas (including the places named), and ports in the Indian Ocean, and any other named place. To make the sentence complete so as to read as the plaintiffs' case demands, it requires the words 'or any one or more of them' to be added after the enumeration of the European ports named, and the words 'or anywhere in such ocean, seas, or ports' after the names of the specified sea or ocean. It would then read, 'between the Atlantic ports' of the United States and the ports of London, Liverpool, 'and Havre, or any one or more of them, and the Pacific Ocean, China Seas (including &c.), and ports in the Indian Ocean, or anywhere in such oceans, seas, or ports.' The voyage in which the vessel in question was actually lost was not in a trade between America and the ports of London, Liverpool, and Havre, but between it and Liverpool alone, being only one of such ports. The changes and additions thus rendered necessary for the plaintiffs' purposes seem to be too extensive for any rule of mere interpretation to justify."

¹ *Silloway v. Nept. Ins. Co.*, 12 Gray, 73.

SECTION IV. — *Of Liberty Policies.*

Most of the preceding questions frequently occur under liberty policies, as they are sometimes called, or policies in which the assured expressly stipulate for liberty to do certain things which they could not do without deviation, or a change of risk, unless the insurers give them this liberty. Such expressions therefore often occur, as "with liberty to enter the port of —," being some place off the course, and which the ship therefore could not otherwise have visited. Now, such a liberty is construed strictly. A vessel that has liberty to "enter" or "touch at" a port, may, it is said, go in and come out; but she must come out as soon as may be, that is, without any avoidable delay, because the liberty to "enter" or "touch at" does not include a liberty to "stop" or "stay." Hence it is common to say, "to touch at and stop" or "stay"; and if a vessel has this liberty as to a certain port, this, it has been said, is no liberty to trade, and her hatches must not be opened in that port.¹ And even if she is at liberty to touch, or stop, or stay, and "discharge her cargo," this is not a liberty to take in a new cargo, and such a proceeding has been held to be a deviation.² But it is obvious, from both the reason of the thing and the best authorities, that no precise construction of such phrases can exist, as a rule of law. The privilege granted must be considered in connection with the character and circumstances of the

¹ *Stitt v. Wardell*, 2 Esp. 610, Park on Ins. 388. In this case insurance was effected on goods on a voyage from Whitehaven to St. Michael's. As reported in Park, liberty was given to touch and stay at any place or places whatsoever, and particularly at Cork in her passage out. The vessel was driven by stress of weather into Dublin, where she unloaded and sold part of her cargo, and then proceeded on her voyage and was lost. Lord Kenyon, C. J., held, that, as the liberty was given only to touch and stay, but not to trade, the unloading and selling of the cargo was a breaking bulk, and avoided the policy. And, on the question being asked by the

plaintiff's counsel, said he should have been of the same opinion if the breaking bulk had been at Cork. The report in 2 Esp. is somewhat different. The liberty "to stay" is not mentioned, and nothing is said about Cork.

² In *Sheriff v. Potts*, 5 Esp. 96, the vessel was insured "at and from Guernsey to Gibraltar, with liberty to touch and discharge goods at Lisbon." Held, that the taking in a cargo for Gibraltar while waiting for convoy at Lisbon was a deviation, although the vessel had a right to wait, under the policy. See also *United States v. The Paul Shearman*, Pet. C. C. 98, 104, per *Washington*, J.

voyage, in order to draw from thence a rational inference as to what was the meaning and intention of the parties; and this is to be followed so far as may be permitted by a reasonably strict construction of their words.¹ Generally, if a ship is lawfully at a

¹ *Urquhart v. Barnard*, 1 Taunt. 450. Insurance, in this case, was made on goods from Madeira to Santos, with liberty to touch at the Cape de Verd Islands. A letter was shown to the agent of the defendant, who signed the policy for him, in which it was mentioned that the vessel would touch at one of the islands named for the purpose of taking in salt. The vessel stopped at Bona Vista, one of the Cape de Verd Islands, where she remained several days taking in salt. Sir *James Mansfield*, C. J., delivering the opinion of the court, said: "It is doubtful, nor can I find it anywhere defined, what is the precise meaning of 'liberty to touch,' as contradistinguished from the meaning of 'liberty to touch and stay.' No case decides this difficulty, though there must be some difference between the two phrases; but the time of staying in both instances is perfectly undefined; and no case decides how long or for what purposes a ship may stay under the license of these clauses." It was held that, since the taking of salt would have been justified had there been a usage to that effect, the underwriters being presumed to have knowledge of usages of trade, therefore the direct knowledge of the intention of the insured communicated to the insurers, and not dissented from, would have the same effect.

In *Gregory v. Christie*, Park on Ins. 67, Lord *Mansfield*, C. J., is reported to have said: "The policy in question differs from others, because it contains a permission to trade, as well as to touch and stay, at any ports or places, which is

not usual in policies of this nature; for in general they only permit them to touch and stay, which words can only be intended to give a permission so to do if necessity oblige them." In 3 Doug. 419, where the case is reported much more briefly, this dictum is omitted. Sir *James Mansfield*, C. J., after citing this opinion as above, said: "This cannot be the true construction. The clause is not required for that purpose; for any ship, without any memorandum for that purpose, has liberty to do what is necessary in order for the preservation of the vessel and the lives of those on board her; as, to take in provisions to save the crew from starving, or to prevent her from sinking by going into port to be repaired. Such acts, though done without the sanction of these words, are no deviation. I know not who was the author of that note, and perhaps it may have been incorrectly taken." Mr. *Phillips*, in his work on Insurance, § 1005, speaking of the language as given by Park, says: "It would require a very strong authority for imputing such a proposition to Lord *Mansfield*, and a still greater than his own to give it any weight, since it would, as Sir *J. Mansfield* remarks, annul the clause, as necessity of itself authorizes touching."

This reasoning is not altogether conclusive, for in many policies permission is expressly given to deviate in a case of necessity, although the law would undoubtedly give it without this clause, and the opinion of Lord *Mansfield* is susceptible of a meaning which is not open to the objections of Sir *James*

port, she may do anything there which does not increase or materially vary the risk.¹ Thus, liberty to touch at a port for any

Mansfield and *Mr. Phillips*. A vessel may deviate on account of want of provisions. Now if the vessel was well supplied in the first place, and the subsequent want was owing to a peril insured against, the deviation would be justifiable on the ground of necessity. But if the want was owing, not to a peril, but to the insufficiency of the supply in the first place, then, although it would be necessary to deviate, still the deviation would not be justifiable so as to make the underwriters responsible. Lord *Mansfield* may have meant merely this: Under a liberty to touch at a port, the master may touch there if compelled by any necessity, although it was caused by the vessel not being provided for the whole voyage. This construction seems to be adopted by the Supreme Court of South Carolina, in *Cross v. Shutliffe*, 2 Bay, 220, where, speaking of a clause which was construed to insure a vessel on a voyage from Charleston to Africa, with leave to touch at the Cape de Verd Islands, the court said: "If this be the true construction which should be given to this policy, it ought to be regarded as a privilege or indulgence, and not as an obligation; that is, if the situation of the crew and ship were such in the course of the voyage as to make it necessary to put in there for supplies, the captain was at liberty so to do, but if not, then it was his duty to make the best of his way to the end of his voyage." If, however, Lord *Mansfield* used the word "necessity" in the sense understood by *Mr. Phillips*, it is clear that his opinion has not been sustained by subsequent authorities.

Thus, in *Metcalf v. Parry*, 4 Campb. 123, where the vessel was insured "at

and from Antigua to England, with liberty to touch at all or any of the West India islands, Jamaica included," the vessel went to St. Kitts and remained there two months taking in cargo. It was contended that this was a deviation, but *Gibbs, C. J.*, held that the whole scope of the policy showed that the vessel might go from island to island seeking freight, and added: "What could be the object of the liberty given her to touch at Jamaica, if she could not stay there to take in goods? Was she to go five hundred miles out of her way for the mere pleasure of viewing that island, and asking for news?" See also *Ashley v. Pratt*, 16 M. & W. 471, 1 Exch. 257; *Gilfert v. Hallet*, 2 Johns. Ca. 296. And in *Chase v. Eagle Ins. Co.*, 5 Pick. 51, where goods were insured from New York to Lynn, the vessel having liberty to call at Newport, at which place the deck load was discharged, this was held not to be a deviation.

¹ As where the vessel is at a port belonging to the voyage. *Cormack v. Gladstone*, 11 East, 347; *Laroche v. Oswin*, 12 East, 131; *Ashley v. Pratt*, 16 M. & W. 471, 1 Exch. 257; *Thorn-dike v. Bordman*, 4 Pick. 471. So, if the vessel puts into port through necessity, she may discharge or take in cargo there, provided the risk is not thereby increased. *Raine v. Bell*, 9 East, 295; *Chase v. Eagle Ins. Co.*, 5 Pick. 51, 53. So where a vessel was driven from her loading port to another, and, not being able to return, completed her loading at the latter port. *Delaney v. Stoddart*, 1 T. R. 22. Or where a vessel deviated to save life on board, and at the port of necessity took in additional cargo. *Perkins v. Augusta Ins. & Bank-*

purpose whatever is said to include liberty to touch there for the purpose of taking on board part of the goods insured.¹ And if liberty is given to stop at all places, or specified places, for trade, refreshment, and recruiting, the vessel is not thereby deprived of her right to stop at other places for purposes connected with the voyage.² So, if liberty is given to stop at a port to ascertain whether there are any hostile men-of-war off the port of destination, the vessel may remain at that port until the danger has passed away.³

It seems to be clear, that the most general liberty of touching, or staying at any port or ports, with or without naming them, must

ing Co., Sup. Jud. Ct., Mass. Nov. T. 1855. In this case, *Merrick, J.*, stated the law as follows: "If a ship under the terms of a policy, or for any sufficient legal cause, is justified in originally entering into the port, her subsequent trading by breaking bulk, loading or unloading, during the period of her lawful stay and detention there, although such trading, loading, and unloading are foreign to the main purpose of the adventure, or not specifically provided for by the terms of the policy, will not be held to amount to a deviation. But it would be otherwise if those caused additional delay, or otherwise substantially enhanced or varied the risk." In *Kane v. Columbian Ins. Co.*, 2 Johns. 264, there appears to have been a necessity for selling the cargo, and the case may not therefore be an authority in point. In *Kingston v. Girard*, 4 Dall. 274, it was held that a ship detained in port by captors might trade. So in *Hughes v. Union Ins. Co.*, 3 Wheat. 159, where the vessel had liberty to stop at a port to ascertain whether there were any men-of-war off her port of destination. In *Lapham v. Atlas Ins. Co.*, 24 Pick. 1, it was held that a vessel insured to a port of discharge in the United States might put into port to inquire for a market, and,

while there, might take a cargo for the port of destination. In *Raine v. Bell*, 9 East, 195, the insurance was on the ship and freight, and Lord *Ellenborough*, C. J., said: "I reserve giving any opinion as to the operation of a change in the state of the cargo in the case of a policy on goods; because the taking in of other goods in the course of one entire voyage, where it is not provided for, may be contended to constitute a different adventure from that on which the ship started with her original cargo." But in *Laroche v. Oswin*, 12 East, 131, the insurance was on goods, and this was held to make no difference. So in *Thorndike v. Bordman*, 4 Pick. 471; *Chase v. Eagle Ins. Co.*, 5 Pick. 51.

¹ *Violett v. Allnutt*, 3 Taunt. 419; *Hunter v. Leathley*, 10 B. & C. 858, 7 Bing. 517.

² *Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26. The vessel in this case was insured on a whaling voyage by a policy containing this clause. It was held that this did not prevent her from entering bays, or touching and staying at islands for the purpose of taking whales or sea elephants, if these were shown to be the proper purposes of a whaling voyage.

³ *Hughes v. Union Ins. Co.*, 3 Wheat. 159.

be construed in reference to the voyage itself, and is so far limited that it will not justify an entrance into any port, if it has no connection with the purposes of the voyage.¹ Nor will a liberty to touch at ports, without naming them, justify the master in wandering more widely from his course than a reasonable interpretation of such a liberty will permit.² So too, if a port be named, it

¹ *Hammond v. Reid*, 4 B. & Ald. 72. The vessel, in this case, put into port to learn the state of the market with reference to another adventure. It was held to be a deviation. So where a ship was insured "at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods," Lord *Ellenborough*, C. J., said: "The liberty in the policy must be construed with reference to the main scope of the voyage insured." *Williams v. Shee*, 3 Campb. 469. In *Solly v. Whitmore*, 5 B. & Ald. 45, insurance was effected on a vessel "at and from Hull to her port or ports of loading in the Baltic Sea and Gulf of Finland, with liberty to proceed to, and touch and stay at, any port or ports whatsoever for any purpose, particularly at *Elsinore*, without being deemed a deviation." The vessel, loaded with goods for *Elsinore*, *Dantzic*, and *Pillau*, which last was her intended port of loading, sailed and delivered the goods at *Elsinore* and *Dantzic*, and was lost on the voyage to *Pillau*. *Abbott*, C. J., delivering the opinion of the court, said: "The liberty given by this policy to touch at any ports for all purposes must be construed to mean purposes connected with the voyage. Here the voyage was from Hull to a loading port in the Baltic, and if the ship had gone to *Elsinore* or *Dantzic* to see if she could get a cargo, that would have been a purpose con-

nected with the voyage, and consequently would not have been a deviation. But the vessel, in fact, went to those ports for the purpose of delivering goods, which was wholly unconnected with the object of the voyage insured. I am therefore of opinion that this was a deviation." See also *Clason v. Simmonds*, cited 6 T. R. 533; *Langhorn v. Allnutt*, 4 Taunt. 511. In *Rucker v. Allnutt*, 15 East, 278, the policy gave the vessel liberty to touch and stay at any ports and places for all purposes whatsoever. Afterwards there was a clause making it lawful for the ship to proceed, sail to, and touch and stay at any ports and places whatsoever or wheresoever, particularly with leave to wait for information off any ports or places. The port of discharge was any port or place in the Baltic. It was held that the vessel might wait either in or off ports for the purpose of obtaining information.

² In *Bottomley v. Bovill*, 5 B. & C. 210, the ship was insured from London to New South Wales, and at and from thence to all ports and places in the East Indies or South America, with liberty for the said ship to proceed, sail to, touch at, and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers to all ports and places in the Channel, Cork in Ireland, Madeira, Cape of Good Hope, St. Helena, and wheresoever the ship might proceed to, as well on this as on the other sides of the Capes of Good

is a deviation to enter another port not named in the stead of that which is named, although the substituted port is no farther off,

Hope and Horn, and for all purposes whatsoever; particularly to trade and sail backwards and forwards, and forwards and backwards. The court held that the voyage insured was from London to New South Wales, and thence to South America or the East Indies, and that, although the words above cited would allow of intermediate voyages, yet only such as were undertaken with a view to an accomplishment of one or other of the voyages pointed out by the policy. So in *Hogg v. Horner, Park on Ins.* 394, where a ship was insured "at and from Lisbon to a port in England, with liberty to call at any one port in Portugal for any purpose whatever," it was held that this would not authorize a voyage from Lisbon to Faro, to complete the loading of the ship, Faro being to the southward of Lisbon and out of the course from Lisbon to England. And in *Ranken v. Reeve, Park on Ins.* (8th ed.), 627, where a ship was insured at and from Africa to the Canaries, Madeira, and Lisbon, with liberty to touch, stay, and trade at all ports, in the voyage, it was held, that, after the inception of the risk in Africa, the vessel could proceed only to the northward towards Europe, and not to the southward. In *Lavabre v. Wilson*, 1 Doug. 284, the voyage was described in these words: "At and from Port L'Orient to Pondicherry, Madras, and China, and at and from thence back to the ship's port or ports of discharge in France, with liberty to touch, in the outward or homeward bound voyage, at the Isles of France and Bourbon, and at all or any other place or places what or where soever." There was also this clause: "And it shall be lawful for the

said ship in this voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, as well on this side as on the other side of the Cape of Good Hope." It was at first contended that the vessel might go to Bengal, and that the ship being there, the voyage might be abridged, and her further progress to China abandoned, on the ground that vessels insured might always return back from any point within the limits of the voyage contained in the policy. But, says the reporter: "Lord Mansfield having intimated a clear opinion that the general words were, by the expressions of 'in the outward or homeward bound voyage,' and 'in this voyage,' qualified and restrained so as to mean, 'all places whatsoever in the usual course of the voyage to and from the places mentioned in the policy,' this ground was immediately abandoned." See *Coles v. Marine Ins. Co.*, 3 Wash. C. C. 159. In *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7, the insurance was on goods "at and from New York to the Cape of Good Hope, with liberty to proceed to and trade at the Isle of France, and any other port or ports in the Indian seas, and at and from these ports back to New York," with liberty to touch and trade as usual on the outward and homeward voyages. The vessel sailed from New York to the Cape of Good Hope, touched at the Isle of France, went thence to the island of Ceylon, thence to Madras, where part of the cargo was sold, and an order on Tranquebar taken in return; she then sailed to this port, purchased some goods, and then went to Batavia, where the remainder of the outward cargo, and that purchased at Tranquebar, were

and in no way increases the risk.¹ And if the vessel is unable to enter the port by reason of a municipal regulation, the liberty is construed so strictly that she cannot go to any other port.² So, if permission is given to deviate on the occurrence of certain specific events, these precise events must take place to give that liberty.³ And a liberty to cruise six weeks means only six successive weeks from the commencement of the cruise.⁴

It is sometimes intended by the parties, that the ship shall have two termini, the beginning and end of the voyage, but may make intermediate passages, backwards and forwards, between these termini. Perhaps the most usual way of meeting the exigencies of such a case as this is by a policy on time, which permits the insured to go where he will. But it may be provided for by certain liberties, expressly given. For this purpose, liberty is sometimes given "to go backwards and forwards," or "to make any intermediate passages," or "to touch and return," or "to touch one or more times," or the like.⁵ If, however, after performing

sold, and the proceeds invested in a return cargo, with which the vessel sailed. Held, no deviation. In *Lambert v. Liddard*, 5 Taunt. 480, the insurance was on a vessel at and from Pernambuco, or any other port or ports in the Brazils, to London. Not being able to obtain a cargo at Pernambuco, the captain sailed to St. Salvador, a port six hundred miles to the southward, and more distant from London than Pernambuco. This was held not to be a deviation.

¹ As the stopping at Morrison's Haven instead of Leith, on a voyage from Caron to Hull, with liberty to call at Leith. *Eliot v. Wilson*, 4 Brown, 470.

² *Stevens v. Commercial Mut. Ins. Co.*, 6 Duer, 594. The insurance in this case was by a time policy, which contained this clause: "Warranted not to use ports and places in Texas, except Galveston, nor foreign ports and places in the Gulf of Mexico, nor places on or over Ocrocoke Bar." Permission was

afterwards given to use the port of Laguna for one voyage. When the vessel arrived at Laguna, she was not permitted to enter under a regulation made prior to the permission, until she had entered at a neighboring port, Laguna not being a port of entry. The vessel went to Sisal for that purpose, and was there lost. Held that this was a deviation which discharged the underwriters.

³ *Duerhagen v. United States Ins. Co.*, 2 S. & R. 309. Goods were insured in this case from New York to Bremen. Liberty was given the captain on arriving on that coast to enter a Dutch port, if he could do so with safety. Hearing that he could proceed to Amsterdam, without being molested by the British, he attempted to enter that port, and was captured by the French. This was considered a deviation.

⁴ *Syers v. Bridge*, 2 Doug. 527.

⁵ In *Thorndike v. Bordman*, 4 Pick.

these intermediate voyages, the vessel is to sail thence to a home port, she cannot after sailing for home put back, unless through an excusing necessity; ¹ and "to such a port and a market" covers

471, the insurance was on the vessel and cargo from Boston to any port or ports beyond the Cape of Good Hope, one or more times to the same port, for the purpose of selling the outward and procuring a return cargo, and at and from thence to a port of final discharge in Europe, or the United States, with liberty to stop at the usual places for refreshments, and to trade thereat. The matter sailed for Cochin China, with directions to purchase a cargo of sugars; but as he had only gold coin on board, with which he could not trade, he sailed thence to Manilla, with the intention of there purchasing a cargo of sugars, or of exchanging the gold for silver, and returning to Cochin China. This latter intention was executed, and he proceeded to Saigon, a port to which an American vessel had never before been. Here he obtained part of his return cargo, and sailed for Batavia, where being unable to obtain any sugars, except at a great expense, he went to Samarang, an outport of the island of Java; but before sailing he was obliged, by a law of the island, in order to proceed to S., to discharge the sugar brought from Cochin China. At Samarang, the cargo was completed, and the vessel sailed for Holland and was lost. Held, that neither the returning from Manilla to Cochin China, nor the selling at Batavia of the sugars purchased in Cochin China, and going thence to Samarang and there taking in a full cargo, was a deviation. See also *Bize v. Fletcher*, 1 Doug. 284. A very liberal construction was given to the policy in *Hunter v. Leathley*, 10 B. & C. 858. Goods were insured "at

and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port or ports of discharge in Great Britain, or to any port or ports in the United Netherlands, or to Altona or Hamburg, or all or any, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere." Liberty was given to proceed to any ports and places whatsoever and wheresoever, in any direction and for any purpose necessary or otherwise, etc. The court held that the assured must have intended to protect himself against loss at whatsoever places in the East the goods might be put on board. Part of a cargo of coffee was put on board at Batavia, with the intention of taking it to Antwerp; but, there not being enough, the vessel went to Sourabaya, another port in the island of Java, and there loaded more coffee, with the intention of taking it to Antwerp, returned thence to Batavia, and thence sailed to Antwerp. Sourabaya is not in the direct course from Batavia, Singapore, Penang, or Malacca, to Europe, nor in the direct course of any one of those four places to any other of them. The underwriters were held liable. Affirmed. *Leathly v. Hunter*, 7 Bing. 517, 5 Moore & P. 457, 1 Crompt. & J. 423, S. C. at *Nisi Prius*, Lloyd & W. 244.

¹ *Burns v. Holmwood*, Q. B. 1856, 19 Law Reporter, 168. The policy was on goods on a voyage "at and from Liverpool to Cardiff, whilst there, and thence to all or any part or parts, place or places, islands and settlements on the west coast of America, in the Pacific,

the vessel while on her way from that port to any other port, in search of a market, to which it is usual to go for that purpose under such a clause, or which is actually within what must be deemed a reasonable distance.¹

and seas adjacent, particularly Acapulco and Panama on the outward voyage, and the Chincha Islands on the homeward, backward and forward, or forward and backward, in any order or succession, during the vessel's stay, trading, discharging, and loading there, and thence back to a port or ports of discharge in the United Kingdom." The vessel arrived at Callao, and sailed thence for the Chincha Islands, and took a full cargo of guano, with which she returned to Callao, at which place vessels from the Chincha Islands clear, and sailed on her homeward voyage. After being at sea a day or two, the vessel sprung a leak, and was compelled to return to Callao. It was necessary to unload the cargo, which was sold for less than it cost to take it out of the vessel. After the vessel was repaired, she returned to the Chincha Islands, took in another cargo and sailed for home, and was lost on the way. Held a deviation, because the vessel had once begun her homeward voyage. But it is sometimes difficult to determine when the outward voyage terminates. In *Ashley v. Pratt*, 16 M. & W. 471, a ship was insured "at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom." The vessel went to Tongkoo in China, discharged part of her cargo there, sailed thence to Manilla, and there discharged most of the remaining cargo. Freights being low at Manilla, a cargo of opium was taken on board for Tongkoo, with the intention

of there seeking a freight back to the United Kingdom. On the voyage to Tongkoo the vessel was lost. It was contended that the voyage back from Manilla to Tongkoo was a deviation; but the court held that *from thence* meant not from Manilla only, but from any place in China or Manilla. This case was affirmed on appeal. *Pratt v. Ashley*, 1 Exch. 257.

In *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 436, a ship and cargo were insured from Newburyport to one or more ports beyond the Cape of Good Hope, one or more times, at and from them, or either of them, to her port of discharge in the United States, with liberty to touch and trade at any ports and places on the outward or homeward voyages. The vessel arrived at the Cape of Good Hope, and sailed thence for the Isle of France. It was held that an intermediate voyage from the Isle of France to the Cape of Good Hope, and back to the Isle of France, would not be protected by the policy. See also *Depeyster v. Sun Mut. Ins. Co.*, 19 N. Y. 272.

¹ Thus, where a vessel was insured "at and from Boston to St. Thomas, and a market in the West Indies, and at and from thence to a port of discharge in the United States," it was held, that, if there was no market at St. Thomas, the master might go from thence to any port in the West Indies for a market, and after leaving that port might return, if such return were with the honest intent of finding a market, and might visit the islands in any order. *Deblois v. Ocean Ins. Co.*, 16 Pick. 303.

In a late case insurance was made in an open policy on property on board vessel or vessels at and from any port or ports in the United States, with liberty to stop at any ports for trade, adding to the premium one eighth per cent for each port. There was indorsed on the policy, "Schooner Potowmac, Norfolk to Salem or Boston." She reached Salem, was ordered at once in Salem to go to Boston, and was wrecked on the way. It was held that the risk terminated at Salem, because, previous to her arrival there, there had been no selection of Boston as the final port of destination before the arrival at Boston. The insured offered evidence that their vessels had gone, under similar policies, first to Salem, and then to Boston, paying one eighth per cent. But it was held inapplicable.¹

The question of the order in which ports should be visited is presented, either when many ports are named, or when there is liberty to touch or trade at ports between certain termini, or embraced within a certain country, district, or coast. Under such a liberty all need not be visited. The insured is never bound to exercise a mere liberty, and the mere omission to do so is never a deviation.² It must be noticed, however, that, although the voy-

See also *Maxwell v. Robinson*, 1 Johns. 333, where, however, the court said they did not mean to say that the same construction was to be given to a policy in any other trade than that to the West Indies.

In *Smith v. Bates*, cited 2 Johns. Ca. 299, the court said, that on a policy to a market in the West Indies, the vessel might go from market to market until the whole cargo was disposed of. And in *Gaither v. Myrick*, 9 Md. 118, it was held that the description "to Valparaiso and a market," would authorize the ship to visit ports other than that named.

¹ *Dodge v. Essex Ins. Co.*, 12 Gray, 65.

² In *Marsden v. Reid*, 3 East, 572, goods were insured "at and from Liverpool to Palermo, Messina, Naples, and Leghorn, provided the French should not be at Leghorn." Intelligence having been received that the French were

in possession of Leghorn, the vessel took goods and cleared for Naples only, and was captured before arriving at the dividing point. It was held that the vessel had a right to go to Naples alone, and that the underwriters were liable. So, where insurance was effected on goods from Boston to Terceira and back to a port of discharge in the United States, a quarter per cent to be added for every other port used in the Western Islands besides Terceira, and the vessel went immediately to Graciosa, one of the Western Islands, it was held not to be a deviation. *Hale v. Mercantile Mar. Ins. Co.*, 6 Pick. 172. The rule has been laid down the same way in *New York. Kane v. Columbian Ins. Co.*, 2 Johns. 264. The voyage in this case was from New York to Antigua, and at and from thence to Curaçoa. It was held that the vessel might go to Curaçoa, without going to Antigua, although she sailed

age may thus be shortened by the omission of a *terminus ad quem*, it must not be by the omission of the *terminus a quo*, as by commencing the voyage at a point in the route at which the vessel had only liberty to stop.¹

If any or all of these ports are visited, they must be visited in their proper order. What this order is, it may not always be easy to determine by rules of law. We should say, however, first, that if the ports be named in the policy, they must be visited in the order in which they are named,² unless the policy itself, the

on a voyage to the latter-named port, and the intention to go to Curaçoa was formed while in a port of distress. So, in *South Carolina, Cross v. Shutliffe*, 2 Bay, 220, where the vessel was insured on a voyage from Charleston to Cape de Verd Islands, and from thence to the coast of Africa, it was held that the vessel might go directly to Africa; the evident intention of the parties being that the vessel should have liberty to stop at the Cape de Verd Islands, which liberty the master was not bound to exercise. And where a vessel was insured from St. Johns to Kingston, and a market in Jamaica, with orders to proceed to Jamaica, and, when off the east end of that island, to proceed to Port Maria, if in season to fulfil a contract for the delivery of goods at that place, but otherwise to proceed to Kingston, and then go to Port Maria, it was held that the vessel might go directly to Port Maria, although these orders were not communicated to the underwriters. *Houston v. New England Ins. Co.*, 5 Pick. 89. But in *Marine Ins. Co. v. Stras*, 1 Munf. 408, where insurance was made, "at and from Norfolk to Curaçoa, with liberty of going to any other island in the West Indies, or any other port on the Spanish Main, and at and from thence back to Richmond," it was held that the vessel was bound to proceed to Curaçoa first, and could not stop at St. Thomas and sail from thence home.

¹ As where a ship and freight were insured "at and from Calcutta, with liberty to touch at Madras, for trade, and to take in a part of her cargo," beginning the said adventure "at and from Calcutta, and to endure until her arrival at New York," it was held that a voyage from Madras to New York, the vessel not having been at all at Calcutta, was not covered by the policy. *Murray v. Columbian Ins. Co.*, 4 Johns. 443. In *Maryland Ins. Co. v. Bossiere*, 9 Gill & J. 121, insurance was effected on the return cargo of a vessel, at and from St. Andreas to Baltimore, with the liberty of two other ports on the Spanish Main, and at and from any of them to Baltimore. In the order for insurance, mention was made that the vessel was reported as having sailed from San Blas for St. Andreas. The vessel had sailed from St. Andreas for Cordea and San Blas, and was proceeding from the latter place to St. Andreas, when she was lost. The court held that the risk had not commenced.

² Thus, in *Beatson v. Haworth*, 6 T. R. 531, the policy was on the ship, "at and from Fisherrow to Gothenburg, and back to Leith and Cockenzie." On the homeward voyage, the ship put into Cockenzie before going to Leith. The latter port was farther from Gothenburg than Cockenzie, but it was held to be a deviation to put into Cockenzie first.

order of the enumeration, the character of the voyage, or other similar circumstances, show that this order was accidental, and not intended to prescribe the course of the voyage. Secondly, if the ports are not enumerated, or are mentioned in an order not intended to direct the course of the voyage, the ports entered must be visited in their geographical order.¹ This generally, but not always or necessarily, means the order in which they would stand on a map; because it may differ from this order, for what is intended is that order which is most consonant with, or conducive to, the progress of the ship to its ultimate destination.² This last is the rule which in fact enters into all the others. Thus, whether an island is to be included in a designation in the policy is to be determined, not by the geography, but by commercial usage.³ And, generally, whatever be the words used, or however wide the liberty given, if there be a definite ultimate destination, this liberty must be construed and exercised in such a way as shall be, on the whole, reconcilable with the proper progress of the vessel toward that destination.⁴

If such ultimate destination is not designated, then it seems that any permitted port may be visited in any order, for the purpose of obtaining instructions or orders which shall determine the final destination of the ship.⁵ In a late case, the voyage was from

¹ See *Clason v. Simmonds*, cited 6 T. R. 533.

² See *Gairdner v. Senhouse*, 3 Taunt. 16.

³ *Robertson v. Clarke*, 1 Bing. 445, 8 Moore, 622; *Robertson v. Money*, Ryan & M. 75.

⁴ A very liberal construction was put upon the policy in *Bragg v. Anderson*, 4 Taunt. 229. The insurance was "at and from Martinique, and *all* or any of the West India islands to London, the ship to have liberty to proceed, sail to, and to touch and stay at any ports or places whatsoever." The ship sailed from Martinique to St. Domingo, which was much out of her direct course to London, took in her cargo at St. Domingo, and sailed thence for London.

Sir *James Mansfield*, C. J., held this not to be a deviation.

⁵ *Mellish v. Andrews*, 16 East, 312, 2 M. & S. 27; s. c. *Andrews v. Mellish*, 5 Taunt. 496. The policy in this case was from London to the ship's port or ports in the Baltic. It was held, that before the port of discharge was selected, the vessel was not confined to take the ports in a successive order, but might return to a port she had quitted for orders as to her port of discharge; and it was said, that, after the port of discharge is selected, the ship must proceed direct, touching at ports only in a successive order. In *Armet v. Innes*, 4 J. B. Moore, 150, the policy was, "at and from London to New South Wales, and from thence to the ship's loading port or

New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one other port between Tarragona and Gibraltar, and at and from thence to New York. By a subsequent indorsement, permission was given to stop at one other port between Tarragona and Gibraltar. The court held, that this latter clause gave the right to stop at one other port between the places mentioned, on the homeward voyage ; but not to stop at Gibraltar also.¹

SECTION V. — *That a Deviation must be Voluntary.*

DEVIATION applies only to a voluntary act. The very definition shows that any change which can be justified, or shown to proceed from a just cause, is not a deviation. And, of course, no act done under compulsion can be regarded as a deviation.² The

ports in the East Indies and elsewhere, forwards and backwards, and backwards and forwards, as well on the other side as at and on this side the Cape of Good Hope, in ports and at sea, at all times and in all places, on all services, until her safe arrival at her port of discharge in Great Britain." It was also provided, that "it should be lawful for the vessel in the voyage insured to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever and for any purpose whatsoever." The vessel went with convicts from London to New South Wales, thence in ballast to Batavia, where she took on board a quantity of iron in bars, which she discharged at Sourabaya, and was there loaded with a full cargo of rice, with which she sailed for the Mauritius, where part was unloaded ; and the vessel, being injured, was broken up. Held to be no deviation, partly on the ground of the existence of a usage for vessels in voyages of that description to trade. See also *Ashley v. Pratt*, 16 M. & W. 471, 1 Exch. 257.

¹ *Perkins v. Augusta Ins. and Banking Co.*, Sup. Jud. Ct., Mass., Nov. T. 1855.

² *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7. In this case the vessel was put in the hands of the American consul at the Isle of France, on account of the death of her officers. The underwriters were held liable for acts done by the consul, which, had they been done by the owners or their agents, would have discharged them.

So, where a vessel was carried out of her course and detained about six weeks by a cruiser, it was held to be no deviation. *Scott v. Thompson*, 4 B. & P. 181.

In *Phelps v. Auldjo*, 2 Campb. 350, it was held, that, where the master of a merchant vessel was ordered by a man-of-war to go out to sea to examine a strange sail, and the master did so without remonstrance, this was a deviation, it not being proved that the master acted under any duress or compulsion. Lord *Ellenborough*, C. J., said, it would have been otherwise "if a degree of force was exercised towards him, which either physically he could not resist, or morally, as a good subject, he ought not to have resisted."

change of risk, to operate as a "deviation," must be not only voluntary but unnecessary; or rather, if it be necessary, it must be considered as compelled, rather than as voluntary. If, therefore, it be necessary to go out of the course for repairs, to obtain provisions, or for any such sufficient cause, it is no deviation;¹ but it

¹ In *Pouverin v. La. State M. & F. Ins. Co.*, 4 Rob. La. 234, it was held, that a vessel insured from New Orleans to Vera Cruz might, on her way through Lake Borgne, touch at the Bay of St. Louis for a pilot to conduct her through Pass Christian.

When a vessel is damaged by a peril of the sea, she may go out of her course to refit. *Motteux v. London Ass. Co.*, 1 Atk. 545; *Gilbert v. Readshaw*, Marsh. Ins. 208, nom. *Guibert v. Readshaw*, Park, Ins. 402; *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 436, 447; *Coles v. Marine Ins. Co.*, 3 Wash. C. C. 159; *Akin v. Miss. M. & F. Ins. Co.*, 16 Mart. La. 661; *Hall v. Franklin Ins. Co.*, 9 Pick. 466; *Turner v. Protection Ins. Co.*, 25 Maine, 515. And if, after the risk has commenced, the vessel becomes so short of hands that the voyage cannot safely be performed, a deviation to obtain a crew is justifiable. *Cruder v. Philadelphia Ins. Co.*, 2 Wash. C. C. 262. In this case, the vessel was at a port when the loss took place, but, as no crew could be obtained there, a voyage to another port was held justifiable. See *Cruder v. Penn. Ins. Co.*, 2 Wash. C. C. 339. So, where the loss took place at sea. *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7.

Where a vessel is driven out of her course by stress of weather, of course, this is no deviation. *Campbell v. Williamson*, 2 Bay, 237; *Miller v. Russell*, 1 Bay, 309. But after the storm has subsided, or the necessity which compelled the deviation ceases to exist, the vessel should pursue the direct course

for the port of destination. *Harrington v. Halkead*, Park, Ins. 403; *Lavabre v. Wilson*, 1 Doug. 284. See *Neilson v. Col. Ins. Co.*, 3 Caines, 108, 1 Johns. 301. And in *Delaney v. Stoddart*, 1 T. R. 22, it was held, that, where a vessel in her loading port was driven out into another port by a storm, she might continue her voyage from there, without going back to the port from whence she was driven.

If a vessel cannot enter her port of destination, on account of the lowness of the water, or remain off the port for fear of shipwreck, she may go to another port. *Byrne v. La. State Ins. Co.*, 19 Mart. La. 126. In *Stocker v. Harris*, 3 Mass. 409, a vessel insured "under whatever papers she might sail," went out of her course to obtain papers. Held, that this was not such a necessity as would justify a deviation.

In *Wiggin v. Amory*, 13 Mass. 118, the vessel was loaded at Bayonne, and in attempting to go out of the harbor struck on a bar, and was obliged to put back for repairs. "It was found necessary, or most for the interest of all concerned, to send part of the cargo round to Passage to be there reladen." After the repairs were finished, the vessel went to Passage, took in her cargo, and proceeded on her homeward voyage. Held, not to be a deviation.

The master is not obliged, before deviating, to sacrifice a deck load, unless perhaps the whole trouble is caused by his being overloaded. *American Ins. Co. v. Francia*, 9 Barr, 390.

becomes a deviation if carried beyond the necessity. Thus, if a master meets with an accident, or finds his ship for any cause in need of repair and refitting, it is his duty, supposing the need to be of sufficient magnitude, to go to the nearest and most accessible port in which he can obtain all that he wants. And if on reaching that port, or by information received on the way thither, he learns that he cannot get the necessary repairs or supplies there, he may go to another port, and then, under the same condition, to another, until his ship be repaired and refitted, and it will be no deviation, — *provided*, that he use all proper means and diligence to lose as little time in this way, and depart as little from the voyage intended, as may be consistent with the effectual repair or supply which he needs.¹ For, whatever be the necessity, unnecessary delay or waste of time or wandering under that necessity will be a deviation.² But if a vessel is driven by a strict necessity into a port, which it would have been a deviation to enter without such necessity, this is not made a deviation by proof that the master, before the necessity and without reference to it, intended to enter that port; provided the necessity occurred before he took any steps to carry that intention into effect.³

So too it is, if not a necessity, or a compulsion, yet a justifying

¹ Hall v. Franklin Ins. Co., 9 Pick. 466, 483; Motteux v. London Ass. Co.; 1 Atk. 545.

² Turner v. Protection Ins. Co., 25 Maine, 515. The vessel, in this case, was insured on a voyage from Havana to St. Petersburg. Soon after leaving port, the vessel met with a disaster, and the master was compelled to seek a port for repair. He altered his course for Boston, which was not the nearest port, and when within fourteen miles of Cape Cod, the weather being thick and hazy, he ran into Portland. The court said: "To determine what port to seek for repair, the master should consider the extent of the danger, its position, as near to or more distant from the course of the voyage, and the facility and speed with which the necessary machin-

ery, materials, and labor can be procured and applied to the vessel's use. The master, in most cases, must be the principal judge of the degree of peril to which his vessel is exposed, and of her ability to proceed with safety to a nearer or to a more distant port, and of the facilities for repairing her at different ports. If he is competent and faithful, his decision respecting these matters, made in good faith, should be satisfactory to all interested, although he should err in judgment." It was accordingly held, that the master had not acted improperly in selecting Boston as the port of repair, and that, on arriving off that port, he exercised a wise discretion in going to Portland.

³ Kingston v. Phelps, cited 7 T. R. 165; Hobart v. Norton, 8 Pick. 159.

cause for a change of risk, that it was undergone for the purpose of avoiding a peril.¹ Thus, if a ship, to avoid seizure in port, goes to sea before she is properly loaded, and is thereby obliged to put into a port out of the course of her voyage, the insurers are still liable.² So, if the port of destination is obstructed by ice, the vessel may put into a neighboring port.³

Questions similar to those we have already considered occur here also. Was the peril so escaped of sufficient reality and magnitude to justify the departure from the usual course? and was the departure no greater in extent, either of space or time, than was reasonably necessary to make this escape effectual?⁴ Nor does it seem to be

¹ As capture. *Driscoll v. Bovil*, 1 B. & P. 313; *Whitney v. Haven*, 13 Mass. 172; *Reade v. Comm. Ins. Co.*, 3 Johns. 352; *Post v. Phoenix Ins. Co.*, 10 Johns. 79; *Goyon v. Pleasants*, 3 Wash. C. C. 241; *Lee v. Gray*, 7 Mass. 349, 352. In *Gouverneur v. United Ins. Co.*, 1 Caines, 592, the captain of a Danish vessel, fearing capture by the British, put his vessel under the protection of an American ship of war, the captain of which sent the vessel home as a prize; and, it being captured on the way, the underwriters were held liable.

² *O'Reilly v. Gonne*, 4 Campb. 249.

³ *Graham v. Comm. Ins. Co.*, 11 Johns. 352.

⁴ In *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, *Marshall, C. J.*, states the law as follows: "No doubt is entertained that the danger of capture from the Algerines, if proved to be real and immediate, would justify the continuance in port. And the apprehension of such danger, if founded on reasonable evidence, would produce a like effect. But, in each case, the danger must not be a mere general danger, indefinite in its application and locality. If it were so, in time of war, any delay, however long, in a port would become excusable, for there would always be danger of

capture from the enemy's cruisers. Nor is it sufficient that the danger should be extraordinary, for then any considerable increase of the general risk would authorize a similar delay. The danger, therefore, must be obvious and immediate in reference to the situation of the ship at the particular time. It must be such as is then directly applied to the interruption of the voyage, and imminent; not such as is merely distant, contingent, and indefinite." See also *Riggin v. Patapasco Ins. Co.*, 7 Harris & J. 279, where it was held, that a deviation to avoid a capture which would not be justified by the law of nations was not justifiable, the captain having no valid reason to suppose that the force in possession of the place which he avoided would violate the rights of a neutral. In *Murden v. South Carolina Ins. Co.*, 3 Const. R. 200, the terminus *ad quem* was changed, on the ground that the vessel was importing slaves, and that this was prohibited by an act of Congress, and also, on the ground that the master apprehended that war had broken out. The latter was considered a groundless pretext, and it was held, that, as both parties knew of the act of Congress, it furnished no excuse for the deviation. In *Riggin v. Patapasco Ins.*

material that the peril which the ship thus endeavors to escape should be one that is insured against. This may not be certainly the law, but assuredly a change of risk would be no deviation, when it was made to avoid a peril, which, although not insured against, would naturally affect, if it were encountered, other risks that were insured against. And most real and substantial risks are so far connected that those insured against can seldom be wholly independent of, or unaffected by, others against which insurance is made.¹

Co., *supra*, it was held, that, though a vessel may deviate to obtain information in regard to her port of destination being in possession of the enemy, yet, if there is a port in the direct line of the voyage, she cannot go to one out of the course.

¹ In *O'Reilly v. Royal Exch. Ass. Co.*, 4 Campb. 246, the goods were warranted free of capture and seizure in port. To avoid seizure, the vessel left port in an unseaworthy condition, and was obliged to put into another port, out of the course of the voyage. Held, that the underwriters were not liable, on the express ground that the deviation was to avoid a peril not insured against. *Breed v. Eaton*, 10 Mass. 21, seems to be to the same effect. Goods were insured on a voyage from Liverpool to Savannah. On arriving off Savannah, the master learned that the non-importation act was in force, and that under it his goods were liable to seizure and confiscation. To avoid this, and for no other reason, the master deviated. The case is briefly reported. The defence was twofold,—that the underwriters were not liable for a deviation to avoid a peril not insured against, and that no insurance against the laws of their own country could bind the insurers. The reporter then adds: "And the court being of this opinion, the plaintiffs were nonsuit." It does

not then appear directly, from this statement, on which ground the opinion of the court proceeded. But, as the case was argued on an agreed statement of facts, part of which was that the plaintiff should become nonsuit if the court should be of opinion that the deviation discharged the underwriters, we may infer the case was decided on this ground, more especially as it is not very apparent how the question as to the legality of the insurance could arise. But, however this may be, the weight of authority seems to be in favor of the view, that a departure from the course to avoid a peril, although that peril is not insured against, is no deviation. This must not be confounded with the question before discussed, of an abandonment of the voyage on account of a peril. In *Robinson v. Marine Ins. Co.*, 2 Johns. 89, the vessel was insured against sea risks only, and a deviation to avoid capture was held to be justifiable. This case was decided principally on the authority of *Scott v. Thompson*, 4 B. & P. 181, where it was held, that if a ship is insured against sea risk and fire only, and is carried out of its course by a peril not insured against, the underwriters are liable for a loss by one of the perils insured against. To the same point is *Green v. Elmslie, Peake*, N. P. 212. Mr. Arnould, 1 Ins. 406, distinguishes between a vessel being com-

If a ship is warranted to depart with convoy, it is no deviation if she sail to the port of rendezvous for convoy.¹ And the law permits her to do this, if she is not warranted to sail with convoy.² So, too, a deviation on the voyage,³ or a delay in port,⁴ for the purpose of joining convoy, is justifiable, if reasonably necessary for that purpose. But it seems that, if only liberty to join convoy be given, the insured is not bound to join convoy, but may waive his right.⁵

It is quite certain that a delay or a departure from the course to save life on board another vessel, or even to give assistance to those in distress, is not a deviation.⁶ Always provided, however, that the change of course, or the delay, was no greater and no longer continued than the cause for it actually required. Nor is it a deviation for a vessel to go out of her course three miles to speak another at sea, on seeing a signal for that purpose, nor to delay three hours to take from a foreign ship, bound to a foreign port, shipwrecked mariners of the United States for the purpose of bringing them direct to the United States.⁷ Whether it is a sufficient excuse or necessity for a deviation, that it was intended to save life on board the vessel insured, may not be so certain. We should say, generally, it would be a sufficient excuse. But if the

pelled to deviate, by a peril not insured against, and a deviation to avoid a peril of this description, holding the insurers not liable in the latter case. This distinction is repudiated by Mr. Phillips, 1 Ins. § 1023. All the authorities, however, which he cites to this point do not support his opinion. In *Riggin v. Patapsco Ins. Co.*, 7 Harris & J. 279, a strong opinion was expressed in favor of holding the underwriters liable in case of a deviation to avoid a peril not insured against, but the point was not decided.

¹ See cases Vol. 1, p. 356, n. 6.

² *Bond v. Nutt*, 2 Cowp. 601.

³ *Enderby v. Fletcher*, Park, Ins. 410; *D'Aguiar v. Tobin*, Holt, N. P. 185, 2 Marsh. 265; *Patrick v. Ludlow*, 3 Johns. Ca. 10.

⁴ *Snowden v. Phoenix Ins. Co.*, 3 Binn. 457.

⁵ *Heselton v. Allnutt*, 1 M. & S. 46.

⁶ There can be no doubt at the present day but that a deviation to save life on board another vessel is justifiable. In the case of *The Schooner Boston*, 1 Sumner, 328, Mr. Justice Story said: "The stopping for this purpose could not, in my judgment, be deemed by any tribunal in Christendom a deviation from the voyage, so as to discharge any insurance, or to render the master criminally or civilly liable for any subsequent disasters to his vessel occasioned thereby." See also *Bond v. Brig Cora*, 2 Wash. C. C. 80; *Lawrence v. Sydebotham*, 6 East, 45; *The Ship Henry Ewbank*, 1 Sumner, 400; *Settle v. St. Louis Perpet. M., F., & L. Ins. Co.*, 7 Mo. 379; *Walsh v. Homer*, 10 Mo. 6.

⁷ *A Box of Bullion*, Sprague, 57.

necessity arose from not having sufficient means of cure on board, and they were such as the vessel should carry, then it would be a deviation and would discharge the underwriters.¹ But it seems to

¹ The question as to the right of master to deviate, in order to save life on board his own vessel, is not without its difficulty. There can be no doubt that if so many of the crew become disabled by sickness that the vessel cannot be navigated in safety to her destined port, a deviation to obtain a crew is justifiable. So, too, if the provisions give out through no fault of those on board the vessel, there being no question as to the vessel's sea-worthiness in this respect when she left port, the underwriters are liable for a loss, notwithstanding a deviation. But if a person rightfully on board be taken sick, and for the sole purpose of saving his or her life the master puts into port, the question is one of some difficulty whether the underwriters are not thereby discharged. In *Perkins v. Augusta Ins. & Banking Co.*, Sup. Jud. Ct., Mass., Nov. T. 1855, the wife of the captain was on board in a pregnant condition, and fell down the cabin stairs, injuring herself badly. To obtain medical assistance and advice, the captain deviated from his course and put into Gibraltar. The court decided that a deviation to save life on board was justifiable, provided it was necessary. *Merrick, J.*, said: "To make the excuse valid and effectual, it must, without doubt, be shown that there was a real necessity for the departure of the vessel from its proper course. The exigency which demands relief must be equal in importance to the intervention which is required in its behalf. Whether it exists and what it is must always be a question of fact. To determine this rightly, all the circumstances of infirmity and

suffering and of relief afforded on the one hand must be considered in connection with the increased length of the voyage, the prolonged time required to accomplish it, and the additional risk incurred on the other." It was then stated that if these conflicted, it became the duty of the master to deviate. The case was sent back to the jury to determine whether "the brig was taken into the port of Gibraltar, and detained there, solely for the purpose of affording succor to the distressed upon a fit and proper occasion." See also *Brown v. Overton*, Sprague, 462.

The same question arose in the early case of *Woolf v. Claggett*, 3 Esp. 257. A deviation was attempted to be justified on the ground that "the captain was taken ill with a severe fit of the gravel; that the mate, having pricked his finger by accident, his hand and arm swelled to such a degree as to render him incapable of doing his duty; and that they put into Plymouth for the purpose of procuring medical assistance." Lord *Eldon* held, that it was incumbent on the plaintiff to show that he had provided against accidents of this nature by every proper precaution, as to medicines and necessaries for the voyage, as much as he was bound with respect to the tightness of the ship. That the plaintiff should show that the surgeon on board the vessel was provided with such medicines and instruments as would probably become necessary in the course of the voyage, arising from the common casualties of mankind. In this case the ship's surgeon was unprovided with a syringe, which was considered to be an instrument very necessary for the gravel,

be held that a delay or a departure for the purpose of saving property is, under all circumstances, a deviation;¹ perhaps for the reason that, if the property be saved, the salvors may claim out of it a recompense by way of salvage, and in decreeing salvage an admiralty court may, and in practice always does, allow for the loss of insurance. A delay for the purpose of towing a vessel is certainly a deviation,² unless there are persons on board the vessel towed who can be saved in no other way.³

If an entirely new voyage is undertaken, the old one being wholly abandoned, this is of course a deviation, and the widest deviation; and it must be very seldom that such undertaking of a new voyage could be so far justified by necessity, or by any circumstances, as would prevent it from being a deviation, and still hold the insurers.⁴

and Lord *Eldon* was of the opinion, upon the whole evidence, that the plaintiff had failed to make out a case of necessity. So in *Kettell v. Wiggin*, 13 Mass. 68, where a vessel, insured from Gibraltar to the United States, with liberty to proceed to the Cape de Verd Islands for salt, on arrival at the Isle of May, finding that there was a scarcity of provisions and water there, made an intermediate voyage to procure them, it was held to be a deviation. This was decided on the ground that the vessel should have been sufficiently provided at Gibraltar to have enabled her to stay and load at the Isle of May without depending on procuring provisions there. See *Thomas v. Royal Exch. Ass. Co.*, 1 Price, 195.

¹ *Bond v. Brig. Cora*, 2 Wash. C. C. 80; *Mason v. Ship Blaireau*, 2 Cranch, 240; *Warder v. Goods, etc.*, 1 Pet. Adm. 31.

² *Hermann v. Western M. & F. Ins. Co.*, 13 La. 516; *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. 340.

³ *Crocker v. Jackson*, Sprague, 141.

⁴ In *Winter v. Delaware Mut. Ins. Co.*, 30 Penn. State, 344, insurance was ef-

fected on a vessel and cargo from Baltimore to Portland in Oregon. The vessel put into Rio Janeiro in distress, and the only way in which she could be repaired was by funds raised on a bottomry bond payable in San Francisco. The ship sailed for this port, but was again obliged to put back to Rio Janeiro, where she was condemned, and sold, together with the cargo. It was contended that the deviation by sailing on the voyage to San Francisco discharged the underwriters. The court, per *Lowrie*, C. J., said: "It was certainly the duty of the master, under the circumstances, to provide for the transportation of the merchandise to its destination by the best means in his power, and, so carried, it would still be under the protection of the insurance. If he could not send it by the direct route, he would be justified in sending it by another; or in taking it by another in his own vessel, if he could not get it repaired so as to go directly. So far, then, as relates to the merchandise, the accident, and the necessary means of repairing it, justified the change of route by San Francisco." See *post*, p. 42, n. 1.

SECTION VI.—*Of Intended Deviation.*

IF, before the policy attaches, the insured, acting in good faith and for sufficient reason, wholly abandons his intended voyage, and substitutes another, the insurers never assume, in fact, any risk, because no risk under their policy ever exists. They therefore, in commercial phrase, do not earn the premium, and it may be reclaimed by the insured.¹ And if an entirely different voyage be intended, for any reason, the policy upon the voyage insured never attaches, although the ship is at the proper port, and sails from it at the proper time; for she never sails on that voyage. It is sometimes a little difficult to reconcile the cases which come under this rule with those to which another rule is applicable, namely, that which declares that no intended change shall amount to a deviation, until the insured has at least begun to carry it into effect; for a mere intention is not an act, and an intention to deviate is not carried into effect, although something is done to forward it, unless that something is an actual change of risk. Thus, if a vessel not insured as a letter of marque takes out letters and arms herself, it has been held, by some authorities, that this act does not discharge the insurers;² nor if she defends her-

¹ See *ante*, Vol. 1, ch. 15, § 2, p. 505.

² In *Denison v. Modigliani*, 5 T. R. 580, the ship and cargo were insured from Liverpool to Oporto. After the policy was taken out, the insured asked permission to take guns on board, and to have a letter of marque. The latter was refused, but it was nevertheless taken out. The ship was taken without having used the letter in any way. The underwriters were discharged, on the ground that the captain had "a strong temptation to deviate," and that this was "an essential alteration of circumstances from the condition of the vessel at the time of the insurance." It is to be observed, however, that permission to take the letter of marque was asked and refused, which was strong evidence of the intention of the parties. And

this is evidently considered as the ground on which the case was decided, in *Moss v. Byrom*, 6 T. R. 379, by Lord Kenyon, C. J., who gave the opinion of the court in *Denison v. Modigliani*. In *Moss v. Byrom*, the letter of marque was taken with the view of inducing the seamen to ship, but as it did not have the necessary certificate, it was invalid, and the question presented in the case of *Denison v. Modigliani* was not decided. There are some dicta in England on this subject, which clearly show that the mere taking a letter of marque would not avoid the policy. Thus, in *Raine v. Bell*, 9 East, 195, 201, *Lawrence, J.*, said: "If an intention to deviate, not carried into effect, will not avoid a policy, still less can a temptation to deviate. If the doing of a thing do not alter the

self; but it certainly becomes a deviation as soon as she chases, or even lays to, for the purpose of making a prize.¹

risk of the underwriter, and be not expressly prohibited to be done, I cannot say that it vitiates the policy as upon the breach of an implied condition." And Lord *Ellenborough*, C. J., in *Jarratt v. Ward*, 1 Campb. 263, 266, said: "I believe the general opinion now is, that a mere irritation of this sort shall not operate as a deviation."

In this country the authorities are in accordance with the view that the mere taking a letter of marque does not discharge the underwriters. *Wiggin v. Amory*, 13 Mass. 118, 14 Mass. 1, 10; *Wiggin v. Boardman*, 14 Mass. 12; *Haven v. Holland*, 2 Mason, 230.

¹ One of the earliest cases on this subject is *Cock v. Townson*, Park, Ins. 396, where a vessel bound from Cork to Jamaica cruised during the night in hopes of meeting with a prize. This was held to be a deviation. In *Jolley v. Walker*, Park, Ins. 396, "the ship was warranted to proceed on that voyage with sixty men, and equipped with twenty-two guns, eighteen and six pound shot, and sheathed with copper." The ship sailed with letters of marque, and was directed not to cruise, but to chase, take, and make prize of an enemy's ship, if one should be met in the direct course of the voyage. The question arose whether, if an enemy's vessel was pursued and lost sight of, the chase could be kept up. Lord *Mansfield*, C. J., left it upon the evidence to the jury, who found for the plaintiffs. In *Parr v. Anderson*, 6 East, 202, 2 Smith, 316, a vessel, insured "with or without letters of marque," saw a sail to leeward, altered her course a quarter of a point, and pursued the vessel about fifteen minutes, and then continued her

voyage. At the first trial before the jury, Lord *Ellenborough* was of the opinion "that the mere liberty to carry a letter of marque would not justify such a deviation, nor give the assured a liberty of engrafting on a commercial adventure an adventure for hostile capture." His lordship then added: "But if it were for the purpose of defence, which might happen in various ways, as by making a show of confidence in the face of an enemy with a view to deter them from an attack, or, if that could not be accomplished, with a view to obtain some advantage in the conflict, or the like," the verdict should be for the plaintiff. The jury having found a verdict for the defendant, a rule *nisi* was obtained, and the case argued before the King's Bench, and sent back to a jury to ascertain the usage of trade, if any, in similar cases. The case of *Jolley v. Walker* was distinguished on the ground that it contained no liberty to take letters of marque, and that the warranty in regard to the number of men and guns showed that the intention was to use the vessel as a private ship of war. Of the further progress of the case of *Parr v. Anderson* we have only a brief note by Mr. *Park*, as follows: "This case came on to be tried again before Lord *Ellenborough*, and a special jury. From my memory of what passed, having been one of the counsel in it, aided by a note which I have seen, his lordship was strongly of opinion, on the evidence, that this vessel had cruised, which of course, if the jury so thought, would put an end to the question. The jury found for the defendant; and I have no doubt, upon that ground, from the evidence of the plain-

If the owner of a vessel, insured at Boston on a voyage from Boston to New Orleans, changes his mind after the insurance is

tiff's own witnesses." *Park, Ins.* 398. But this seems to confine the use to which a letter of marque may be put within rather narrow limits. In *Hooe v. Mason*, 1 Wash. Va. 207, it was held that a merchant vessel with a letter of marque was not obliged to act merely on the defensive, but might attack and chase an enemy in sight, but could not cruise out of her course to look for prizes. And Mr. Justice *Jackson*, in *Wiggin v. Amory*, 13 Mass. 118, 127, said: "The only material difference between a privateer and a ship sailing under a letter of marque is the use to be made of their commissions. The one intends to cruise in search of prizes, and the other intends to attack and take only what may fall in her way."

In *Wiggin v. Amory*, 13 Mass. 118, it was held that the capture of a vessel, although the vessel did not go off of her course, but merely delayed for a few hours, was a deviation, the underwriters not knowing that a letter of marque was taken. In *Wiggin v. Boardman*, 14 Mass. 12, the facts were the same except that the jury found that the defendant knew before he subscribed the policy that the ship was armed and equipped, and commissioned as a letter of marque. The court said: "The knowledge that a vessel is armed, and has a commission, does not necessarily carry with it an assent that the vessel shall do anything which may cause a delay of her voyage, or that her commission shall be used, except for defence. It may be that she is armed only for the purpose of defence, and that her commission is to be used only to justify the attack of such vessels as

may come in her way; and possibly the capture of such vessels, if that can be done without delaying the voyage." The underwriters were therefore held not to be liable.

In *Haven v. Holland*, 2 Mason, 230, which was an action on a policy of insurance upon merchandise on board the same vessel, the *Volant*, *Story, J.*, instructed the jury that if, when the *Volant* wore round to attack the other vessel, "it was for the purpose of self-defence, to intimidate the enemy, and to repel a meditated attack, before the *Volant* should herself be disabled," the act was not a deviation, but otherwise, if it was done without any view to self-defence, and for the mere purpose of making a prize. He also ruled that, if the capture was made in self-defence, the master had a right to take possession of the prize, and man it, if he could do so without injuriously weakening his own crew. In regard to what would be an act of self-defence the learned judge said: "If a vessel, supposed to be an enemy's cruiser, be in sight, and apparently intend an attack upon a merchant vessel, the master of the latter is bound to exercise his best skill and judgment as to the time and mode of his defence; and if he act honestly and fairly, he will be justified, whatever may be the event. He is not bound to endeavor to make his escape in the first instance, and on failure of this, to meet the enemy; nor is he bound to lay by or fly until an attack is commenced upon him, and he has received injury, and then, and not before, to exert his right of self-defence. The law vests him with a large discretion for the benefit of all concerned. He is to con-

effected, and the vessel sails from Boston for Liverpool, this is no deviation, because the policy never attaches. The voyage insured never begins, although it is true that, until the vessel leaves Boston Harbor and passes the lower light, her route will be the same for both voyages.¹ But if a vessel, after being insured on such a voyage, receives goods on board to be left at Savannah on her way to New Orleans, and sails with this intention, it seems that it would be a sailing upon the voyage to New Orleans, with an intention to deviate from it as soon as the vessel reached that point at which a vessel bound for Savannah would bear away for that port. The policy would therefore attach; and until the ves-

sult the safety of the persons and property on board, in the best manner he can. He may lay to, or chase the enemy's ship, if he deem that the most effectual means of securing his object. It may be his best course to begin the attack, and to attempt to cripple the enemy, or to encourage his own crew by commencing a chase, or to intimidate the enemy by laying to, and showing a determination to resist any attack." Mr. *Phillips* mentions a subsequent suit between a shipper of goods and the owners of the vessel, in which it appeared "that the taking possession of the captured vessel was a defensive measure, for the purpose of preventing intelligence of the course of *The Volant* to British cruisers, whereby she might have been exposed to capture." It was accordingly held not to be a deviation. *Gray v. Thorndike*, Sup. Jud. Ct., Mass. Suffolk, Nov. T. 1817. 1 *Phillips*, Ins. § 1030. We have examined the records of the court, but have been unable to find on what precise grounds the verdict of the jury was rendered. If a vessel on a fishing voyage has liberty to chase, capture, and man prizes, she cannot lie nine days off a port waiting for an enemy's ship to come out, although she should be during that time

within the limits of her fishing-ground. *Hibbert v. Halliday*, 2 Taunt. 428. If liberty is given to see a prize into port, the ship will not be authorized to remain in port, while the prize is undergoing repair. *Jarratt v. Ward*, 1 Campb. 263. If a vessel has liberty to cruise and capture, she may convoy her prizes, if she does not go out of her course for that purpose, and the risk is not increased thereby. *Ward v. Wood*, 13 Mass. 589. But if the vessel shortens sail, or lays to in order to let the prize keep up with her, this is a deviation. *Lawrence v. Sydebotham*, 6 East, 45.

¹ *Wooldridge v. Boydell*, 1 Doug. 16; *Tasker v. Cunningham*, 1 Bligh, 87; *Way v. Modigliani*, 2 T. R. 30. In *Forbes v. Church*, 3 Johns. Ca. 159, a cargo was insured from New York to Andero. The vessel cleared for Hamburg, but on the way she altered her course with the intention of proceeding to St. Andero, and going thence to Hamburg at a more favorable season, but was captured on the way. Held, that the voyage insured had never commenced. See *Bain v. Kippen*, Millar, Ins. 445, and cases *infra*, p. 40, n. 1.

sel actually changed her course there would be no deviation, and the insurers would be liable for a loss occurring while the vessel was on the route which she would have pursued had she been bound to New Orleans alone, but not for a loss which happened after she had entered upon a course which she took only because she was bound to Savannah.¹

In neither of these cases, perhaps, could any question arise ; but it is obvious that in other cases, which come, as it were, between these, there might be much difficulty in determining whether the vessel sailed on the voyage proposed, but with the intention to de-

¹ *Foster v. Wilmer*, 2 Str. 1249 ; *Carter v. Royal Exch. Ass. Co.*, Id. ; *Thellusson v. Fergusson*, 1 Doug. 361 ; *Kewley v. Ryan*, 2 H. Bl. 343 ; *Hare v. Travis*, 7 B. & C. 14 ; *Marine Ins. Co. v. Tucker*, 3 Cranch, 357 ; *Thompson v. Alsop*, 1 Root, 64 ; *Henshaw v. Marine Ins. Co.*, 2 Caines, 274 ; *Hobart v. Norton*, 8 Pick. 159 ; *Winter v. Delaware Mutual Ins. Co.*, 30 Penn. State, 334.

In *Heselton v. Allnutt*, 1 M. & S. 46, insurance was effected at and from Heligoland to Memel, with liberty to touch at any ports whatsoever. The captain sailed with written orders to go to Gottenburg, and there ascertain whether he should proceed to Anholt or Memel. The vessel was lost before she arrived at Gottenburg. The underwriters were held liable, on the ground that there was a good inception of the voyage from H. to M., subject to be changed according as circumstances might require. A similar question was presented in *Lawrence v. Ocean Ins. Co.*, 11 Johns. 241, under circumstances somewhat more favorable for the underwriters, but they were nevertheless held liable. The risk was "at and from New York to Gottenburg, and at and from thence to a port in the Baltic." On arrival at Gottenburg the assured elected St. Petersburg as the ultimate port of destination, and sailed for the same, but being compelled to go

into Carlsham, the vessel wintered there, and, before leaving, the supercargo determined to go to Stockholm instead of to St. Petersburg, and sailed for that port. While on the route common to the two the vessel was captured. The Supreme Court held that this was but an intended deviation, and not an abandonment of the voyage. Of the five judges who at that time constituted the court, one dissented and one gave no opinion, not having heard the arguments. On appeal to the Court of Errors, in a case against another company, depending on the same facts, the decision of the Supreme Court was affirmed, Chancellor *Kent* dissenting. *New York Firem. Ins. Co. v. Lawrence*, 14 Johns. 46.

The case of *Silva v. Low*, 1 Johns. Ca. 184, where the voyage was from Wilmington to Falmouth, and the master, before the vessel sailed, declared his intention to put into New York for seamen, and the underwriters were accordingly discharged, is not in conflict with the cases above cited. It was so decided, not on the ground of a deviation, but because this intention was considered as showing either that the vessel was unseaworthy when she left Wilmington, or that the seamen were not shipped for the whole voyage.

viate, or upon a different voyage. We know of no rule or principle which could always answer this question. It seems to be one of mixed law and fact. We should say, in general, that if the proposed change in the voyage was sufficient in extent, quantity, and importance to make it a change of the whole voyage from the beginning, then there was an abandonment of the voyage intended and the substitution of another; for it is quite certain that if a vessel sails *from* the place at which the insurance should attach and the risk commence, but not on the *voyage* insured, the policy does not attach.¹ But if the change be not enough for this, then it must be regarded only as an intention to deviate, which has no effect whatever upon the rights or obligations of either party, until it is carried into effect.

If the vessel sails with the intention not to go to the terminus to which she is insured, but to some other port or place, it would seem to be very difficult to construe this as a mere intention to deviate, or as anything less than another voyage, although the vessel sail through much the larger part of her course in the direction which led to the proper terminus; although, perhaps even here, if the change took place only at a very short distance, the two ports being very near to each other, this might be construed as the same voyage, with an intention to deviate; but we should prefer the former construction even in this case.² If the ship actually sails

¹ *Sellar v. M'Vicar*, 4 B. & P. 23. So, in *Lippincourt v. La. Ins. Co.*, 2 La. 399, an insurance for six months' trading between New Orleans and any port in the West Indies, United States, or Gulf of Mexico, was held not to protect a voyage between the West Indies and a port in the United States other than New Orleans.

² In *Marine Ins. Co. v. Tucker*, 3 Cranch, 357, Mr. Justice *Johnson* said: "The ordinary rule for ascertaining the identity of a voyage insured is by adverting to the termini. A rule which is certainly correct as far as it extends, but in the rigid application of which it is easy to conceive that cases may occur in which it would bear injuriously upon

the insurer. If it has any defect, it is in not extending far enough the claim to indemnity, as the terminus *ad quem* may, in many instances, be relinquished without any possible increase of risk, or even without varying the risk, excepting only as to lessening its duration. I will instance the case of an insurance from America to St. Petersburg, when the vessel, in fact, is to terminate her voyage at Copenhagen; or the case of an insurance to Alexandria, in Virginia, when the vessel is to terminate her voyage at Georgetown, in Maryland." But see *Marine Ins. Co. v. Stras*, 1 Munf. 408, where the taking a return cargo to Norfolk, in Virginia, instead of to Richmond in the same State, which latter was her

on the voyage intended, the fact that she cleared for a different voyage does not discharge the insurers.¹

It may be added, that, after a deviation has taken place, the forfeiture incurred by it may be waived by an agreement to that effect.²

port of destination, was held a deviation.

In *Stocker v. Harris*, 3 Mass. 409, the ship, cargo, and freight were insured from Boston to the Canaries, at and from thence to any port or ports in Spanish America, in the Atlantic or Ethiopic Ocean, at and from thence to her port of discharge in the United States. After performing her outward voyage, the vessel cleared with a cargo for the Havana. On the passage, but before she had left the track she must have taken if coming to the United States, the vessel was captured. The underwriters were held not to be liable. See also *Merrill v. Boylston Ins. Co.*, 3 Allen, 247.

¹ *Planché v. Fletcher*, 1 Doug. 251; *Barnewall v. Church*, 1 Caines, 217; *Talcot v. Marine Ins. Co.*, 2 Johns. 180; *McFee v. South Carolina Ins. Co.*, 2 McCord, 503. In *Winter v. Delaware Mut. Ins. Co.*, 30 Penn. State, 334, the vessel was compelled to put into an intermediate port for repairs, and the master could only obtain money for that purpose by giving a bottomry bond payable on the arrival of the vessel at a port other than that to which she was insured. She accordingly was repaired and sailed for the substituted port. It was held, that, while she was still on the track to the original port of destination, there was merely an intention to deviate, and not an abandonment of the original voyage, if the jury should find that the intention was, after leaving the substituted port, to proceed to the original port of destination.

² *Warren v. Ocean Ins. Co.*, 16 Maine,

439; *Crowningshield v. New York Ins. Co.*, 3 Johns. Ca. 142. In *Glidden v. Manufacturers' Ins. Co.*, 1 Sumner, 232, the vessel was insured from Newcastle, Maine, to her port of discharge in Martinique, and at and from thence to her port of discharge in the United States. The vessel went to *Mariegallante*, took on board a return cargo, and sailed for *Damariscotta*, Maine. She touched at *St. Eustatia*, and was afterwards lost on the way to *Damariscotta*. After it was known that the vessel had been at *St. Eustatia*, the following memorandum was added to the policy by consent: "It is now understood that the within insured vessel has been to *St. Eustatia*, and sailed thence for Boston about twenty-five days since, which deviation shall not prejudice the within insurance. *Story, J.*, said: "The question is, whether this memorandum helps the plaintiff's case. I am of opinion it does not. In the first place, it waives nothing more than the deviation from the voyage, by going to *St. Eustatia*, and not that by going to *Mariegallante* and not going to *Martinique*. In the next place, this waiver is only upon a statement in the memorandum, that the voyage was from *St. Eustatia* to Boston; whereas it was, in fact, to *Damariscotta*." It has been held, that if a vessel is insured after the voyage has commenced, but the risk is to begin from the commencement of the voyage, the underwriters are discharged by a deviation, although they knew of it when the policy was made. *Redman v. Lowdon*, 5 Taunt. 462, 1 Marsh. 136, 3 Campb. 503.

CHAPTER II.

OF THE TERMINI OF THE VOYAGE, AND OF THE RISK.

SECTION I. — *That these Termini must be distinctly stated.*

In the preceding chapter we have seen the importance of ascertaining the termini of the voyage, because on this may sometimes depend the question of deviation. A more frequent reference to the termini is required for the purpose of deciding whether a loss has happened before, after, or during the voyage insured, or the risk insured against.

The first rule on this subject is, that the policy must state specifically what these termini are. Thus, a policy from — to —, or from — to A, or from A to —, is incomplete, and never attaches.¹ So it is, if the termini are named and described, but in such a way as has no meaning, or leaves a substantial doubt as to what is meant by the description.

SECTION II. — *Of the Commencement of the Risk.*

To determine when the risk begins, the date of the policy is sometimes important; for it takes effect from that date, although the

¹ Molloy, Book 2, ch. 7, § 14. See also *Manly v. United M. & F. Ins. Co.*, 9 Mass. 85, 89, per *Sewall, J.* In *Folsom v. Merchants' Mut. M. Ins. Co.*, 38 Maine, 414, insurance was effected "on the outfits of schooner Pilot, for a fishing voyage to the Banks and back to a port of discharge in the United States." It was held, that though the commencement and termination of the risk were not distinctly stated, yet the policy was valid, if the intention of the parties could be satisfactorily gathered from its provisions, and that any obscurity could be removed by reference to the situation of the parties, and evidence

that the vessel was at a certain port when the policy was executed, and there took on board the property insured, and sailed from thence on the voyage, was admitted to determine the terminus *a quo*. In *Cleveland v. Union Ins. Co.*, 8 Mass. 308, it was contended that the description "at and from Salem to any port or ports, place or places, backwards and forwards, round the globe, one or more times, during her stay and trade at all such places, until her return to her port of discharge in the United States," was too loose and indefinite, but the court held it to be sufficient.

insurers do not deliver it to the insured until afterwards, if the contract were fully made at the time of the date.¹

The insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made, and even if that loss be total, so that the subject-matter of the insurance is then non-existent. This is usually done by the words, "lost or not lost," which are introduced into most policies; but any language indicating the same purpose would have the same effect. Nor is there any sufficient reason why this already existing loss should be wholly unknown to both parties. If known to the assured, he must of course communicate it; but then, if neither the amount, nor any circumstances which would determine the amount are known, the insurers may, if they please, take this risk upon themselves.² So, too, if insurance is effected on goods "lost or not lost," the underwriters are liable for a partial loss which took place before the insured acquired any interest in the goods.³ If a policy is to take effect on the occurrence of a certain event, it will attach, although the event has taken place before the date of the policy, if at the time of the date the subject insured is in the condition described in the policy.⁴

If insurance is made to commence "on" a certain day, it begins at the beginning of the day, and covers all losses occurring in any part of it. If the word used be "from" a certain day, strictly speaking it should exclude the whole of that day; and such would be the construction, if there are no facts or admissible

¹ See *ante*, Vol. 1, p. 36, n. 5; p. 44, n. 5. in this case was, "lost or not lost, \$10,000 on the bark *Esperanza*, building at Perry, to take effect as soon as

² *Mead v. Davison*, 3 A. & E. 303; *Gladstones v. Royal Exch. Ass. Co.*, cited *ante*, Vol. 1, p. 332, n. 3. water-borne." The policy was executed November 15, and the vessel was

³ *Sutherland v. Pratt*, 11 M. & W. 296, *Parke, B.*, said: "It operates just in the same way as if the plaintiff, having purchased goods at sea, the defendant (the insurer), for a premium, had agreed that, if the goods had at the time of the purchase sustained any damage by perils of the sea, he would make it good." launched on the preceding day. It was contended that the policy was to attach only on the happening of an event subsequent, namely, the vessel being water-borne; but the court held, that, even if the words "lost or not lost" did not make the policy attach the moment the vessel was water-borne, yet, as the vessel was in the situation described when the policy was executed, the policy attached from that time.

⁴ *Cobb v. New England Mutual M. Ins. Co.*, 6 Gray, 192. The insurance

evidence to control it.¹ A distinction has been taken between "from the date," which is held to include the day, and "from the day of the date," which excludes it.² But this distinction seems almost too nice for practical use; and we should say that either of these phrases, or any one of like character, would be always open to construction upon the evidence, and the circumstances of each case.³

If the insurance be on goods, it may be said, as a general rule, that the policy attaches to them when it would attach to the vessel carrying them, if she were insured. If the risk is to begin at a certain time, and this be definitely fixed, and the policy also provides that the insurance shall begin upon the ship "at" a certain place, the policy may attach at that time, although the ship be at another place, if the whole policy and all the circumstances make it certain that the name of the place is either surplusage or a mere term of description.⁴

¹ In *Chiles v. Smith*, 13 B. Mon. 460, it was held, that, if time is to be computed from an act done, the day on which the act was done must be included, but if the computation is to be made from the day itself, then the day must be excluded, on the authority of *Bellasis v. Hester*, 1 Ld. Raym. 280. In *Lorent v. South Carolina Ins. Co.*, 1 Nott & McC. 505, the question was, whether a policy issued on the day of the passage of the embargo act was valid or not. The embargo was laid for the term of ninety days, from and after the passage of the act. The court held, that it did not go into operation till the day after the passage of it, and the policy was, therefore, valid.

² *Sir Robert Howard's Case*, 2 Salk. 625.

³ This subject was elaborately considered by Lord Mansfield, C. J., in *Pugh v. Leeds*, Cowp. 714. He held, that the word "from" might be either inclusive or exclusive, according to the context and subject-matter, and that "the day," and "the day of the date," meant in every case the same thing, and

said: "The date is a memorandum of the day when the deed was delivered. In Latin it is *datum*, and *datum tali die* is delivered on such a day. Then, in point of law, there is no fraction of a day; it is an indivisible point. What is 'the day of the date'? It is 'the day the deed is delivered.' 'The date,' therefore, being also defined to be the day the deed is delivered, 'the date,' and 'the day of the date,' must mean the same thing. The day of the date is only a superfluous expression."

⁴ *Manly v. United Mar. & F. Ins. Co.*, 9 Mass. 85. In *Martin v. Fishing Ins. Co.*, 20 Pick. 389, a vessel was insured "at and from Calais, Maine, on the 16th day of July, at noon, to, at, and from all ports and places, to which she may proceed in the coasting business, for six months." The court held, that the policy attached, although there was no evidence that the vessel was at, or prosecuting her voyage from Calais on the day named. See also *Grousset v. Sea Ins. Co.*, 24 Wend. 209. And in *Kent v. Manuf. Ins. Co.*, 18 Pick. 19, the vessel was insured at and from Bos-

If the words used be "at and from" a certain place, to which the ship is sailing, the risk begins when the vessel is at that place, in such condition as is contemplated by the policy; and, in general, this must be a safe condition. It is said, indeed, that the policy does not attach, unless the vessel is there in safety.¹ But we do not see that she needs, always, to be there in safety. If, for instance, one policy insures her "to" such a place, and a second is made upon her "at" that place, for the obvious purpose of attaching when the first ceases, and the ship arrives at the place in a violent and dangerous storm, which continues until the first policy is discharged, we do not see that the danger prevents the second policy from attaching. If the policy on the homeward voyage is stated to be in continuance of the policy on the outward, it would certainly take effect on the termination of the outward, but perhaps not otherwise.² In a very late English case a ship

ton to certain places. The policy was dated October 18th. There was a previous policy on time, for one year, which expired October 20. The vessel sailed from Boston on the 18th or 19th of October and was never heard from. The court held, that the second policy attached on the 20th of October, although the vessel was at sea, and if she was lost after that time the underwriters were liable.

¹ Upon the question, whether the risk on a ship "at and from" a port commences on her arrival, or whether it begins when she has been moored twenty-four hours in safety, see *Garrigues v. Cox*, 1 Binn. 592, where the latter rule was adopted. In *Patrick v. Ludlow*, 3 Johns. Ca. 10, 14, *Kent, J.*, said: "The true rule on this subject is, that at and from, when applied to a ship, includes the period of her stay in the port from the time of her arrival there." The question before the court was distinct from this, and the remarks of the learned judge were altogether *obiter*. In *Motteux v. London Ass. Co.*, 1 Atk. 545, 548, Lord Chancellor *Hardwicke* said: "There was a case before

me, upon a trial at Guildhall, where it was then debated, whether the words 'at and from Bengal to England' meant the first arrival of the ship at Bengal. And it was agreed that the words 'first arrival' were implied and always understood in policies." It is to be observed, in regard to this case, that the chancellor did not intend to distinguish between the moment of arrival and the being moored twenty-four hours, but the case was mentioned as bearing on the question, whether, under the words used, the assured might leave the port, make an intermediate voyage, and then return and sail for the port of destination.

See also *Parmeter v. Cousina*, 2 Campb. 235, in which Lord *Ellenborough*, C. J., held, that the policy did not attach until the ship was in safety. See *ante*, Vol. 1, p. 386, n. 4. And in *Bell v. Bell*, 2 Campb. 475, 478, Lord *Ellenborough* said: "The safety required to give a good commencement to the risk on the ship is a physical safety from the perils insured against, and not a freedom from political danger."

² *Spitta v. Woodman*, 2 Taunt. 316.

was insured "at and from Havana to Greenock," and the declaration alleged that the ship, when at Havana, and after the commencement and during the continuance of the risk, sustained injury by the perils insured against. In the harbor, and while in charge of the pilot, the ship was crossing a shoal, and was seen to stir the mud, but was not felt to take the ground. The pilot then gave orders to let go the anchor, which was done, and the next day the captain, attempting to turn her, found he could not, and then ascertained that she had sustained damage from the anchor of another ship. There was some conflict of evidence as to whether the ship struck the anchor and was stopped by it, or whether she settled down upon it on the falling of the tide. It was held that the policy had attached when the injury took place.¹ The greater part of the policies of the present day contain a clause, by reason of which the outward voyage does not expire till the vessel has been moored twenty-four hours in safety. And this question would not then arise.

If the words are "at and from" a certain port, although the insurance begins only at that port, the word may comprehend an open roadstead, or any places included naturally or usually within the port named, as places at which vessels receiving cargoes are considered as "at" the port. It is sometimes a difficult question of mixed law and fact, whether a certain place is really within the scope of the word "port" or is a part of a place named; and this question can only be answered by usage and the nature of the case.²

¹ *Houghton v. Empire Mar. Ins. Co.*, Ct of Exch. Hilary Term, 1866. *Channel*, B., said: "In my opinion she was at that time at Havana, and consequently the risk under the policy had attached. The damage occurred at Havana, *geographically speaking*, and there is nothing which to my mind shows that the parties at the time this policy was underwritten contemplated any other meaning of the word 'at.'" *Pigott*, B., also said: "As the ship has arrived geographically within the harbor of Havana, and was in safety there before the injury was received, the risk then com-

menced." It is plain, however, that the ship was not *safely moored*, and the legal inference from this case must be that the words "at and from" are to be construed in their geographical sense, and therefore the policy attaches as soon as the vessel arrives within the port named, although not *safely moored*.

² *De Longuemere v. Firem. Ins. Co.*, 10 Johns. 126. In *Higgins v. Aguilar*, cited 2 Taunt. 406, on a policy, at and from Demerara to London, it was held, that a loading at Essequibo was a loading at Demerara. This was decided upon the particular usage of the trade.

The words "at and from" are often, if not always, especially in a home port, intended to cover a ship while in the port preparing for her voyage, as well as after she begins it. And there may not only be a "deviation" in the port, springing from unreasonable slowness or entire suspension of the preparations, but the policy may never attach from the want of the preparations, or its attachment be delayed by a delay in the preparations; so that where a vessel has been a long time in a port, the risk seems not to commence until preparations are begun for the voyage insured.¹

If the insurance be "from" only, and not "at," it does not begin until the vessel leaves the port or place; that is, weighs anchor, or casts off her moorings with the preparations which she purposes made, and with the intention of sailing.² But the word

And in *McCargo v. Merchants' Ins. Co.*, 10 Rob. La. 334, slaves, taken on board in Hampton Roads, were held to come within a policy "at and from Norfolk." So insurance on goods at and from the ship's loading port or ports in Amelia Island will cover goods taken in at Tigre Island, there being no port at Amelia Island and the usage of the trade being for ships to lie at Tigre Island to take on board their cargoes and then clear from Amelia Island. *Moxon v. Atkins*, 3 Campb. 200. So, Grass Island has been held to be within the port of Limerick. *Bell v. Mar. Ins. Co.*, 8 S. & R. 98. See, generally, as to the meaning of the word "port," *Hull Dock Co. v. Browne*, 2 B. & Ad. 43; *Stockton R. Co. v. Barrett*, 7 Man. & G. 870; *Cockey v. Atkinson*, 2 B. & Ald. 460.

In *Payne v. Hutchinson*, 2 Taunt. 405, note, goods were insured "at and from Caermarthen to London." The vessel took in her cargo at Llanelly and sailed thence for London. Llanelly is a member of the port of Caermarthen, but there is a distinct custom-house at each of these places. Caermarthen lies higher up the river, and is accessible

only by an intricate navigation. The vessel cleared at L. It was held, that the risk had not commenced. See also *Constable v. Noble*, 2 Taunt. 403; *Brown v. Tayleur*, 4 A. & E. 241.

¹ *Seamans v. Loring*, 1 Mason, 127, 140; *Kemble v. Bowne*, 1 Caines, 75. See also *ante*, p. 9, n. 4. In *Lambert v. Liddard*, 5 Taunt. 480, a vessel which was then cruising was insured "at and from Pernambuco or any other port or ports in the Brazils, to London, beginning the adventure on the termination of the cruise, and preparing for her voyage to London." The vessel, at the end of the cruise, was off the coast of Brazil to the northward of Pernambuco. The master sent a boat ashore to see if a cargo could be obtained at Pernambuco, and finding that it could not, he set sail for St. Salvador, for the purpose of obtaining a cargo, and the vessel was lost on the way. It was held, that the risk attached from the time the master sent the boat ashore, on the termination of the cruise, that being considered preparing for the voyage within the policy.

² See *Mey v. South Carolina Ins. Co.*, 3 Brev. 329, and cases *ante*, Vol. 1, p. 357-363.

“from” has a more extended meaning when applied to an intermediate port. Thus, if a vessel be insured at and from A to B, from thence to C and back to A, a loss at B will be covered.¹

If the insurance is on goods “at and from” a place, it does not begin (unless expressly so provided in the policy),² until the goods come under a marine risk, that is, until they are laden on board the vessel, or whatever else it is customary to use in loading them, as a boat or lighter.³ And this applies equally to insurance against lake or river risks. In some cases of insurance on goods, these words, “to begin from the loading of the goods on board,” are held to define the terminus *a quo* so distinctly, that, if there be no loading at the designated place, there is no such terminus, and no beginning of the insurance. So, if there were insurance on cargo on a voyage from A to B, beginning the adventure from the loading of the goods on board at A, if the goods are laden on board before the vessel reaches A, and are not reladen at A, the adventure never begins, and the policy never attaches.⁴ And, even if

¹ *Bradley v. Nashville Ins. Co.*, 3 La. Ann. 708. In *Bell v. Marine Ins. Co.*, 8 S. & R. 98, a vessel was insured at and from Philadelphia to Cork and back to Philadelphia. After discharging her outward cargo at Cork, the vessel went to Limerick, and the captain wrote home, communicating this fact, and stating that his ship was then lying at Grass Island. This letter was shown to the underwriter, who thereupon made the following memorandum on the policy: “It being represented by the assured that The Amiable was ordered from Cork to Limerick, and had arrived there, it is hereby agreed that, for a further consideration of one per cent, we engage to see the said ship from thence, instead of Cork, back to Philadelphia.” The court held that the vessel was covered while at Limerick, as well as from that port, such being the manifest intention of the parties.

² See *Kennebec Co. v. Augusta Ins. and Banking Co.*, 6 Gray, 204.

³ In *Coggeshall v. Am. Ins. Co.*, 3 Wend. 283, the vessel was on a trading voyage on the western coast of South America. The policy covered goods laden on board the vessel during a specified period. Within this time a basket of virgin silver was lost while being brought from the shore to the vessel in a flat-boat. Held, that, this being the customary mode of taking goods on board, the underwriters were liable. So, during the voyage, goods in boats are as much protected while the boats are “employed as auxiliary to the legitimate purpose of the voyage” as they are while on board the ship. *Parsons v. Mass. F. & M. Ins. Co.*, 6 Mass. 197, 208.

⁴ *Hodgson v. Richardson*, 1 W. Bl. 463; *Horney v. Lushington*, 15 East, 46, 3 Campb. 85; *Robertson v. French*, 4 East, 130; *Grant v. Paxton*, 1 Taunt. 463; *Park v. Hammond*, 6 Taunt. 495; *Rickman v. Carstairs*, 5 B. & Ad. 651, 2 Nev. & M. 562; *Graves v. Marine*

the goods are insured from A to B, beginning the adventure from the loading of the goods, without specifying where, the policy does not attach, unless the goods are laden at A.¹ If similar words are used, they are *prima facie* subject to this construction, as the only *grammatical* construction. There are, however, many cases in which it is obvious that they are not used, either in this sense, or for this purpose, but only as words of description, which are to be considered, construed, and applied in connection with the language of the whole policy and all the circumstances of the case. And if these make it apparent that it was not the intention of the parties to make the attachment of the policy dependent upon the fact of the loading, it would seem to us a departure, not only from natural justice, but from the true and rational principles of commercial law, to give these words this construction and effect.² The fact that the cargo is valued is not evidence that the risk was to attach on the outward cargo.³

Ins. Co., 2 Caines, 339; *Scriba v. Ins. Co. of N. A.*, 2 Wash. C. C. 107; *Richards v. Marine Ins. Co.*, 3 Johns. 307.

¹ *Spitta v. Woodman*, 2 Taunt. 416; *Mellish v. Allnutt*, 2 M. & S. 106; *Langhorn v. Hardy*, 4 Taunt. 628. See also the next note.

² In *Bell v. Hobson*, 16 East, 240, 3 Campb. 272, goods were insured at and from Gottenburg to any port in the Baltic, beginning the adventure from the loading of the goods on board. The policy was declared to be in continuation of other policies which were on the same goods from Virginia to any port in the United Kingdom, but the defendant was not an underwriter upon any of the former policies. Lord *Ellenborough*, C. J., said: "A very strict, and certainly a construction not to be favored, and still less to be extended, was adopted in the case of *Spitta v. Woodman*, where it was holden that the words, 'beginning the adventure

from the loading on board,' were to be confined to the place from whence the risk commenced. But if there be anything to indicate that a prior loading was contemplated by the parties it will release the case from that strict construction. Then, can there be anything more indicative of such an understanding between the parties, than the statement, made at the foot of this policy, that it was in continuation of former policies, which were distinctly upon a voyage from Virginia? This was taking up the voyage from a period in the former policies. The conclusion, therefore, which was drawn in *Spitta v. Woodman*, is completely rebutted by the reference in this policy to an antecedent loading."

In *Spitta v. Woodman*, 2 Taunt. 416, the defendant had insured the same goods from London to Gottenburg, the outward voyage, and therefore knew that the subsequent policy was on the same goods; but, notwithstanding this,

³ *Rickman v. Carstairs*, 5 B. & Ad. 651.

It is very clear, that, if goods are insured "at and from" a certain place, they are covered, although previously loaded at another place.¹ And goods subsequently loaded are covered, if such is the manifest intention of the parties, although the risk

he was exonerated. So, in *Langhorn v. Hardy*, 4 Taunt. 628, where the jury expressly found that the defendant knew at the time of executing the policy that the cargo was put on board at London, and was intended to continue on board during the voyage insured, the policy describing the risk to commence from the loading of the goods on board at Gottenburg. The case of *Vredenbergh v. Gracie*, decided Jan. T. 1799, 4 Johns. 444, note, and referred to in *Graves v. Marine-Ins. Co.*, 2 Caines, 339, 342, was this: Goods were insured on board the brig *Nancy*, at and from any port or ports in the West Indies, and at and from thence to New York, "beginning the adventure on the said goods from the loading thereof on board in the West Indies." The goods were shipped in New York, and were not insured on the outward voyage. At the time of the insurance, the vessel was in the West Indies, and the underwriter was informed that the goods were shipped in New York; a letter was also shown him, in which it was stated that the vessel had arrived at Cape Nicolas Mole, and, after disposing of part of her cargo there, had proceeded to St. Marks with the rest. "It was also," says *Thompson, J.*, in 2 Caines, 342, "by the express understanding of the underwriter, a policy on goods shipped at New York; and, the vessel being already in the West Indies, that part of the world was only mentioned as the place where the risk was to commence."

In *Gladstone v. Clay*, 1 M. & S. 418, goods were insured "at and from Per-

nambuco to Maranham, and at and from thence to Liverpool, beginning the adventure from the loading of the goods wheresoever," etc. The underwriter was held liable for loss happening to the goods on the voyage between Pernambuco and Maranham, although the goods were laden at London.

In regard to what is to be considered as a loading at the port at which the risk is to commence, see *Nonnen v. Reid*, 16 East, 176, where part of the goods were unloaded and landed on the wharf, sufficient in quantity to enable the custom-house officers to examine the whole cargo on board, and then that taken out was reloaded. This was considered as a reloading of the whole. In *Murray v. Col. Ins. Co.*, 11 Johns. 302, the whole cargo was hoisted on deck at the loading port, in order to take on board some salt as ballast, and it was then examined and restowed. It was held, that the policy attached on the salt only.

¹ *Gardner v. Col. Ins. Co.*, 2 Cranch, C. C. 473. The voyage described in the policy was "at and from Rio Janeiro to Santos, and two ports in South America, and at and from either of them to a port of discharge in the West Indies, or Europe, or the United States," and the risk was declared to be on goods "at and from Rio Janeiro until safely landed at Santos." It was held, that goods laden on board at Cadiz, which were lost between Rio Janeiro and Santos, were covered. See also *Silloway v. Nept. Ins. Co.*, 12 Gray, 73.

was to commence from the loading on board at the port of departure.¹

The word "at," especially in connection with "to" and "from," may apply to an island, or region of coast or district, in such a way as to cover the vessel while sailing from port to port, or place to place, within that district. Whether it shall have this effect must depend upon the construction which is required by usage, by the context of the policy, and by the facts of the case.²

If the insurance be on a certain voyage, the presumption of law—liable to be rebutted only by very strong evidence—would confine this to the *next* voyage which comes under this description.³ But the attachment of the policy may be delayed, and not prevented by a different voyage previously, under circumstances of necessity or compulsion,⁴ or by a voyage permitted by usage.⁵

¹ In *Grant v. Delacour*, 3 Taunt. 466, "the policy was at and from London to all ports and places, on this side, and on the other side, of the Cape of Good Hope, forwards and backwards at sea, at all times, on all services, and in all ports and places, until the ship's safe arrival back again at her last station of discharge at Blackwall, or Deptford, upon any kind of goods in the Brunswick, beginning the adventure upon the said goods from the loading thereof on board the said ship at London, and so should continue." The court held, that though these words literally applied only to goods taken on board at London, yet, as the course of such a voyage was to trade away the goods taken out, the words would apply to any goods acquired by trading, wherever loaded on board. But in *Grant v. Paxton*, 1 Taunt. 463, where goods were insured "at and from China to all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, beyond the Cape of Good Hope, in port and at sea, in all places, at all times,

and in all services, until the ship's safe arrival at London," which was not the last place of discharge, the court held, that only goods put on board at China were covered, and not those loaded elsewhere on the voyage from China to London.

Insurance on goods at and from Plymouth to Malta, with liberty to touch at Penzance for any purpose whatever, beginning the adventure from the loading thereof on board as aforesaid, will cover goods taken on board at Penzance. *Violett v. Allnutt*, 3 Taunt. 419. See also *Barclay v. Stirling*, 5 M. & S. 6; *Hunter v. Leathley*, 10 B. & C. 858, 7 Bing. 517.

² *Dickey v. Baltimore Ins. Co.*, 7 Cranch, 327; *Cruikshank v. Janson*, 2 Taunt. 301; *Camden v. Cowley*, 1 W. Bl. 417; *Warre v. Miller*, 4 B. & C. 538.

³ *Courtenay v. Miss. M. & F. Ins. Co.*, 12 La. 233.

⁴ *Driscoll v. Passmore*, 1 B. & P. 200.

⁵ See *ante*, p. 8, n. 2.

SECTION III. — *Of the Termination of the Risk.*

INSURANCE to a place, or to a port of discharge, or until arrival in port, must terminate at the first place or port of arrival which distinctly and certainly answers to the description. But, if the ship reaches a port only for the purposes of inquiry or advice, and leaves it at once, or is instantly ordered by the owners to another port, there to discharge the cargo, the first port would not be a port of discharge.¹ And if the phrase be "a final port," or "to ports of discharge," the insurance will cease upon such parts of the cargo as are landed at one port or another, but not on those remaining on board and in the ship, until the port is reached at which the whole of the cargo remaining is to be discharged.² And whatever port may have been intended by

¹ *Coolidge v. Gray*, 8 Mass. 527; *Lapham v. Atlas Ins. Co.*, 24 Pick. 1; *King v. Middletown Ins. Co.*, 1 Conn. 184; *Sage v. Middletown Ins. Co.*, 1 Conn. 239; *King v. Hartford Ins. Co.*, 1 Conn. 333. And where a vessel is insured to two ports, either or both, she may put into a third port to inquire as to the state of the markets at these ports. *Clark v. United F. & M. Ins. Co.*, 7 Mass. 365. In *King v. Middletown Ins. Co.*, a ship was insured on her homeward voyage to a port of discharge in the United States. She cleared for and arrived at New York. As soon as the owner heard of her arrival, he ordered her to proceed to Middletown. To enable her to sail up the river, part of the cargo was taken out to lighten her. The cargo was entered at the custom-house and the duties paid. On the way to Middletown the vessel was wrecked, and the underwriters were held liable, on the ground that neither the clearing for New York, the arrival there, nor the waiting for orders and lightening the vessel, constituted New York the

port of discharge, although it was said, that the unloading of the cargo would have had this effect. In *Sage v. Middletown Ins. Co.*, it was held, that the unloading of part of the cargo, which was in a perishing condition, while waiting for orders, would not terminate the risk. And if the crew is discharged and another immediately reshipped at such a port, the underwriter is still liable for a subsequent loss. *King v. Hartford Ins. Co.*, *supra*.

² *Inglis v. Vaux*, 3 Campb. 437; *Preston v. Greenwood*, 4 Doug. 28. In *Moore v. Taylor*, 1 A. & E. 25, a ship was insured at and from St. Vincent, Barbadoes, and all or any of the West India islands, to her port or ports of discharge and loading in the United Kingdom, during her stay there and thence back to Barbadoes and all or any of the West Indies, until the ship should arrive at her final port, as aforesaid. The vessel took in a cargo at Liverpool, and discharged the same at Barbadoes, except some coal and brick, which the jury found were kept on board merely

the parties, the port where the cargo is actually unladen from

for ballast. Held, that the risk ended as soon as the cargo was delivered, and did not continue while the ship, in ballast, was seeking for a new cargo. And in *Upton v. Salem Comm. Ins. Co.*, 8 Met. 605, the court held, where a vessel was insured at and from Salem to her port or ports of discharge on the river La Plata, that the risk terminated when the cargo was substantially discharged. In *Richardson v. London Ass. Co.*, 4 Campb. 94, goods, the investment of the captain, were insured on an East India voyage, until their arrival at the last place of discharge on the outward voyage. The captain landed the whole of his investment at Calcutta, and sold part, but, not being able to find purchasers for the residue, determined to carry it on for a new market. The outward cargo had all been discharged, and the vessel was ordered to make an intermediate voyage to Madras, under the usual clause in the charter-party. On the voyage, the goods were lost. Held, that the risk, being on the outward voyage merely, had terminated. In *Brown v. Vigne*, 12 East, 283, a ship was insured to any port or ports in the river Plata, until her arrival at her last port of discharge. The master intended to discharge at Buenos Ayres, but, that place being in the hands of the enemy, he went to Monte Video, with the intent to make a full discharge there, if the market were favorable. But, not finding the market there so favorable as he expected, he determined to go to Buenos Ayres, if it should be practicable, but while discharging his cargo a loss happened. The court held, that, as he could not legally go to Buenos Ayres, that place being in possession of the enemy, Monte

Video was to be considered as the last port of discharge, and on the arrival of the vessel there the risk terminated. In *Oliverson v. Brightman*, 8 Q. B. 781, the goods were insured at and from Liverpool to Lintin, Hong-Kong, Macao, Canton, or any other ports, etc., with liberty to transship or reship on board any other vessel at or off any of the ports above mentioned, and with leave for that vessel to proceed, and discharge the goods at any of the places above mentioned, or to remain there till it should be deemed expedient to proceed, "continuing the risk by land and water, until the goods should be arrived at their final port of destination." Before the arrival of the vessel at Macao, hostilities had taken place between the Chinese and the English, who in May had stormed Canton, but hostilities had been suspended, though peace was not declared till a year later. There had been no formal declaration of war. It not being considered safe for the ship to proceed to Canton, another ship was chartered to accompany her to Hong-Kong, in order that the goods might be transhipped and examined, and kept there till they could be sent to Canton, or some other market. There was no market at Hong-Kong, and it was not intended to make it the final place of deposit for sale. While the goods were on board the second ship, they were lost by a peril of the seas, and the underwriters were held liable. In *Stephens v. Beverly Ins. Co.*, Sup. Jud. Ct., Mass., Essex, 1820, where a vessel was insured from Beverly to Bilboa, or a port of discharge in Europe, it was held that the vessel could go only to Bilboa or some other port, and not to both.

the ship is "the port of discharge," and such a policy therefore terminates there.¹

It has been recently held that a policy of insurance upon a ship for a year, "and if she be then at sea at the end of the year, then to continue at a *pro rata* premium until she arrives at her port of destination," terminates when the ship at the end of the year is, or afterwards first arrives, at a place to which she is sent to take a cargo, although it is not a port by law, but an open roadstead, with no haven, harbor, or custom-house, and is not her final destination.²

The phrase "at sea" seems to be held as covering every place where the ship may be, from the commencement to the termination of the voyage insured, although during parts of it she may have been actually anchored in ports, for shelter or otherwise. And the phrase "on a passage" has been held to be of equivalent import with "at sea."³ But perhaps this construction should

¹ In *Moffat v. Ward*, 4 Doug. 31, note, it appeared that the ship had unloaded all of her cargo at Madras, and was afterwards lost on her way to Bengal. The underwriters were exonerated, on the ground that the last port of discharge was not the port where she was originally destined to discharge part of her cargo, but that at which it was in fact discharged. In *Shapley v. Tappan*, 9 Mass. 20, the ship was insured from Boston to Tonningen, for the purpose of carrying a cargo there. She was driven by a storm into the river Elbe, seized at Glückstadt, and afterwards liberated, and the cargo delivered to the consignee there, by his consent. Held, that the risk was then terminated.

² *Cole v. Union Mut. Ins. Co.*, and *Gookin v. N. E. Mar. Ins. Co.*, 12 Gray, 519. And see note to 12 Gray, 519.

³ *Bowen v. Hope Ins. Co.*, and *The Same v. Merchants' Ins. Co.*, 20 Pick. 275, were two cases argued and decided as one. In the one the ship was insured for a year, and if "at sea"

when the year expired, then until her arrival at port. In the second, the insurance was the same, excepting that the phrase "if at sea" was, in this latter case, "if on her passage." The year ended the 6th of October, 1834. On September 25th, the ship being at Bangor, in Wales, with her cargo on board, weighed anchor with the intention of proceeding to Boston, and dropped down several miles below Bangor, but, not being able to get out of the Straits of Menai (on which Bangor is situated), on account of head winds, came to anchor; and on several days attempted to get out of the straits, but did not succeed until the 8th of October. *Shaw*, C. J., said: "The term 'at sea' may have different meanings, according to the connection in which it is used. Here it is used in contradistinction to 'arrival in port.' If the vessel has sailed, or commenced a voyage from one port to another, she must be considered to be at sea, within the meaning of this clause, from the commencement to the termination of that

be applied especially to the case of a ship which, by the policy, is to be insured on a certain day "if at sea"; in which case it may be reasonable to consider the word as meaning only "not at home." It is generally provided in time policies, that, if the vessel be "at sea" at the expiration of the time agreed on, the risk shall continue until her arrival at a port of discharge, or at her port of destination.¹ If, then, before the expiration of the time,

voyage, although during parts of it she may have sought shelter in a place on the way. . . . In the other policy, the contingency upon which the risk is to continue at the end of the year, is a little differently expressed, the words being, if the vessel shall then be 'on a passage.' We think the meaning and legal effect are the same in this as in the other policy."

¹ In *Wood v. New England Mar. Ins. Co.*, 14 Mass. 31, a vessel was insured for twelve months, commencing on the 30th of December, from Newburyport to every place to which she might proceed, the risk to continue until the vessel should arrive, and be moored twenty-four hours in safety, or until the expiration of twelve months. It was further provided, that, if the vessel should be at sea at the expiration of the above period, the risk should continue until her arrival at a port of discharge. On the 14th of the following November the vessel sailed on a voyage from Beverly for Amsterdam, and on the 14th of December was captured and carried into port, where she was detained until after the expiration of the twelve months, when the vessel was liberated, and sailed for Amsterdam. On the way she was captured. *Parker, C. J.*, in delivering the opinion of the court, said: "At the expiration of the year, the ship was not literally at sea; but was in a British port, whither she had been carried against the will of the master. Was

she then, within a fair construction of the contract, within the intent of the parties, at sea? We think she was. She was absent on a voyage, which had been commenced within the time of the original risk. She would have been protected, upon that voyage, to Amsterdam and back again, because within the common meaning of the term 'at sea,' which was undoubtedly adopted by these parties. A vessel is considered in that condition, while on her voyage, and pursuing the business of it, although during part of the time she is necessarily within some port, in the prosecution of her voyage. The intention in prolonging the risk beyond twelve months was unquestionably to give the ship protection under the policy, in case that time should expire while the vessel should be employed in some unfinished voyage; and whether in a foreign port, or actually upon the high seas, we believe there was no difference in the contemplation of the parties, when the contract was made." We consider this case as having been correctly decided; but the language used by the court, as given above, went further than the facts of the case required, and cannot, it seems to us, with all deference to the learned judge who pronounced the opinion, be supported by principle or authority; for the risk was to continue only to a port of discharge, and not to the port, which might perhaps be construed as meaning the final port of discharge. See *Bowen*

she has actually broken ground for the voyage, or if she has sailed, and is, when the time expires, in a port of necessity, she is considered "at sea," and is covered by the policy until her arrival at her port of final destination, or at her port of destination in a particular country, provided the master does not unnecessarily delay his voyage thither after the time has expired.¹

v. Hope Ins. Co., 20 Pick. 275, cited in the preceding note.

The dictum of *Parker, C. J.*, cited above, is directly opposed to a case decided in New York. *American Ins. Co. v. Hutton*, 24 Wend. 330, affirmed *Hutton v. American Ins. Co.*, 7 Hill, 321. In this case a vessel was insured for a year, commencing January 21st; if at sea at the expiration of the term, the risk was to continue until the arrival of the vessel at her port of destination, but the policy did not mention what the port was. The vessel sailed from New York on a voyage for St. Barts, Curaçoa, and Maracaibo, and thence back to the port of New York. Maracaibo being in a state of insurrection, the vessel put into St. Thomas, for the purpose of taking a cargo thence to Philadelphia or New York. She arrived at St. Thomas on the 6th of January, but, extensive repairs being required, she was detained there for that purpose until after the 21st. After she was repaired, she took in her cargo, and sailed on the 30th of January, and was lost February 18. If the repairs had not been necessary, she would have sailed before the 21st. The insurers were exonerated, on the ground that the vessel was not "at sea" on the 21st, but was in a port of destination, although not in her final port. It was however admitted, that, if the vessel had put into St. Thomas through necessity, the underwriters would have been liable.

¹ *Union Ins. Co. v. Tysen*, 3 Hill, 118. The policy provided, in this case, that if

the vessel was at sea on the day the risk expired, October 7th, it should continue until she reached her port of destination in the United States. On the 20th of September the vessel was at Rotterdam, in a canal, discharging her cargo. Finding no return freight to the United States, the captain determined to go to Newcastle-upon-Tyne, and thence home to New York. The ship was accordingly moved from the canal into the river Maese, about twenty-five miles from the sea, and was all ready for sea, but owing to contrary winds she did not sail until after the 7th of October. Held, that the moving from the canal was the commencement of the voyage, and that the vessel was protected till her arrival at her port of destination in the United States.

In *Eyre v. Marine Ins. Co.*, 6 Whart. 247, a vessel was insured for twelve months, from November 10th, with liberty of the globe, and, if at sea, etc., the risk to continue until her arrival at her port of destination in the United States. The vessel sailed from Philadelphia in November for South America, for the purpose of freighting, took a cargo on board at Rio Janeiro in South America, and sailed for the island of Jersey in the British Channel for orders. On the 10th of the following November she was at sea, and afterwards, having sustained heavy damage, she was compelled to put into Falmouth, England, for repairs. She then sailed for Altona, discharged her cargo, took another on freight, and in June sailed for New Orleans, where

If the insurance be to "a port" in a certain island or coast, or to "two ports" or more,¹ the insured may select any which come within the district. But the risk terminates when the vessel has been moored twenty-four hours in safety at the first port in the island at which she arrives, if the insurance be to "a port" in that island, or to the island.² If a vessel is insured on a fishing voyage, the risk does not terminate by her sending home part of her cargo which is damaged, and which, if suffered to remain on board, would injure the rest.³ A policy on time for a certain period terminates at the time as that exists at the place where the contract is made, unless it is otherwise mentioned in the policy.⁴ If

she arrived. The action was brought to recover for the damage done on the voyage to the island of Jersey. The court held that, if at the end of the year, the vessel was coming home, she was protected by the policy, but otherwise not, and excluded evidence that the voyage insured was known by the name of a trading voyage, and that, by the usage of trade, the vessel might sail for any part of the globe to which she could get a freight, at any time during the year, and continue covered by the policy during such voyage, although this usage was alleged to be well known to the underwriters, and acted upon by them, at the port to which the vessel belonged. But the court in 5 Watts & S. 116, being of opinion that this evidence ought to have been admitted, granted a new trial.

¹ *Vandervoort v. Smith*, 2 Caines, 155. In *Sea Ins. Co. of Scotland v. Gavin*, 2 Dow & C. 125, insurance was effected at and from Leith or Shetland, and from thence to Barcelona, and at and from thence, and two other ports in Spain, to a port in Great Britain. The vessel discharged her cargo at Tarragona, and then proceeded to Saloe, where she was lost. It was objected that Saloe was not a port within the meaning of the policy, it being a mere roadstead

protected by a headland; but the court held that as it was usually designated as a port, and was not more open than other places on the Mediterranean, and as it had a custom-house and harbor-master, and port duties were levied there, it was a port within the meaning of that term in the policy.

² *Camden v. Cowley*, 1 W. Bl. 417; *Leigh v. Mather*, 2 Esp. 412. This case is more fully reported in *Park on Ins.* 52, where it appears that the insurance was on the ship and goods "at and from Georgia to Jamaica." On the arrival of the ship in Montego Bay, most of the cargo was sold to merchants there, and the captain entered into a charter-party with them to proceed to St. Anne's, and there take in a cargo for London. Most of the cargo was unloaded at Montego Bay, and it was verbally agreed that the remainder should be carried as ballast to St. Anne's. It was held, that as Montego Bay was the original destination of the cargo, and as the delivery of the whole there was prevented only by a new agreement, the risk did not continue after the departure of the vessel. See also *Barras v. London Ass. Co.*, *Park on Ins.* 52.

³ *Phillips v. Champion*, 6 Taunt. 3.

⁴ *Walker v. Protection Ins. Co.*, 29 Maine, 317.

a ship is insured until "she shall have ended and be discharged of her voyage," it seems that the risk continues till she is unladen.¹

By the phrase usually contained in both the English policies and our own, the insurance continues on the vessel "until she shall be arrived and moored twenty-four hours in safety"; and on goods "until landed," or "safely landed." This means safety from the perils insured against, and not to those of a merely local character and incident to the port, as bad moorings, etc.; otherwise the policy might attach all the time she lay there. But she must be moored as safely as that harbor or port permits, in the usual course of navigation. And if the vessel be ordered off, or into quarantine, before the twenty-four hours have passed, the policy does not cease to attach.² And if she anchors and moors safely, and her actual safety continues through a storm or peril which begins before or within the twenty-four hours, but does no harm until they have expired, she is considered as moored in safety during the twenty-four hours; because otherwise the risk might never terminate; for so long as the ship is in any port she must be in some degree of danger, or possibility of mischief.³ By arrival is meant the reaching the usual place of unloading;⁴ and by safety, not

¹ So held by the whole court on demurrer in *Anonymous*, *Skinner*, 243.

² *Waples v. Eames*, 2 *Strange*, 1243.

³ *Bill v. Mason*, 6 *Mass.* 313.

⁴ In *Samuel v. Royal Exch. Ass. Co.*, 8 B. & C. 119, a vessel was insured at and from Sierra Leone to London, until moored twenty-four hours in safety. The master, being ordered to take the vessel into the King's Dock at Deptford, moored the vessel near the docks, but was not able to enter, on account of the ice. After lying several days in this place, where cargoes were sometimes discharged, the vessel was totally lost. Held, that the place where she had lain, not being her place of ultimate destination, the underwriters were liable. In *Angerstein v. Bell, Park, Ins.* 45, the vessel arrived at the wharf where she was to be unladen, but, there not being

room on the inside, she was fastened on the outside of the tier of vessels, and after remaining in this position more than twenty-four hours was lost. Held, that she had arrived. In *Meigs v. Mutual Mar. Ins. Co.*, 2 *Cush.* 439, the insurance was on a vessel and her catchings on a whaling voyage, the risk to continue on and during her voyage and back to M., "until she be arrived and moored twenty-four hours in safety." On the return of the vessel to M., the water was not high enough to enable her to reach her wharf, which was her place of final destination. She was accordingly anchored in the harbor, and, while being lightened and on her way to the wharf with proper diligence, was destroyed by fire. This did not happen until more than a week after her arrival in the harbor. The royal yards and

security from the hazard of every loss insured against, — for some of them, as fire, lightning, etc., remain always, — but the being moored in fact during twenty-four hours, safe in the sense of unin-

masts, and top-gallant masts and yards, were sent down, and all the sails unbent except the three topsails, spanker, and jib, which were left to work the ship to the wharf with. The court held that, under these circumstances, the insurers were liable, and said: "Reaching the harbor, therefore, cannot be arriving within the meaning of the policy; and, if it do not mean that, it must mean that particular place or point in the harbor which is the ultimate destination of the ship. Until that point is reached, the voyage is not ended, and the ship has not arrived; though she may be obstructed and delayed in her progress through the harbor, and for want of water, or by adverse winds, or other causes, be obliged to come to anchor, and remain at anchor twenty-four hours, and to take out some portion of her cargo. While she is properly pursuing her course to the place of her ultimate destination, and of complete and final unloading, and until she reaches that place, and has been moored there in safety twenty-four hours, she is insured and protected by the policy." This case is somewhat inconsistent with a case decided in England about the same time. *Whitwell v. Harrison*, 2 Exch. 127. The vessel was insured until moored at her discharging port in the United Kingdom, twenty-four hours, in safety. She was chartered to take a cargo of timber from Quebec to Wallasey Pool in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo. The vessel arrived abreast of Wallasey Pool on the 5th of the month, but was not able to enter it for want of sufficient water. Most of the

crew were discharged, and the vessel was lightened. On the 14th of the month she fell over and was injured. All the cargo was not out at this time, and it was the captain's intention to take the vessel into Wallasey Pool, with as much of the cargo on board as he could carry with safety. The court held that the vessel had arrived and been moored twenty-four hours in safety. *Alderson, B.*, said: "It appeared in evidence, that the captain always intended ultimately to carry the vessel into Wallasey Pool with as much of the cargo on board as she could carry over the shallow part intervening between his original anchorage and the Pool. But it was also clearly established, that the discharge of the cargo was going on in due course, and that if the water were not sufficient, and no accident had occurred, the whole cargo would have been discharged in the place where the vessel was moored. Here the vessel was bound to Wallasey Pool, or as near thereto as she could safely get, and it is clear that that was the intended place for the discharge of her cargo." If this case can be distinguished at all from *Meigs v. Mutual Mar. Ins. Co.*, it is on the ground that in the one the place of ultimate destination was the wharf, and in the other the Pool, or as near to it as the vessel could get.

The port of Havana consists of an outer and inner harbor. The outer is near the Moro Castle, and is used for the purposes of visit and search. It is an exposed and dangerous place, and it has accordingly been held that the risk on a vessel does not terminate until she has been moored twenty-four hours in

jured.¹ But, if the vessel arrives a mere wreck, she cannot be said to have been in safety a moment.² Nor if an embargo had been laid on all vessels previous to the arrival of the one insured, although she should not be arrested till the next day.³

If a vessel is insured from a place to any port or ports whatsoever, for a certain space of time, an open roadstead which is the usual place of loading and unloading is a port within the meaning of that phrase in the policy.⁴ Goods are within the policy as not safely landed so long as they are in boats or lighters, if this be the usual way of taking them from the ship to the port; and we should apply the same rule to any mode of conveyance by water, however unusual, which was made necessary, and therefore justifiable, by the circumstances of the case.⁵ If the consignee sends his own lighter for the goods, the risk has been held to terminate on the delivery of the goods on board the lighter.⁶

safety in the inner harbor. *Dickey v. United Ins. Co.*, 11 Johns. 358; *Zacharie v. Orleans Ins. Co.*, 17 Mart. La. 637.

In *Gray v. Gardner*, 17 Mass. 188, a contract was made which was to be void in case a certain quantity of oil arrived at Nantucket and New Bedford on or before a certain day. It was held that the word "arrived" meant that the vessel in which the oil was to be brought should drop anchor within the time, and the condition was not satisfied by the vessel merely being in the Nantucket Roads.

¹ *Bill v. Mason*, 6 Mass. 313. The vessel in this case arrived in a gale of wind, but was not injured by it, until after she had been moored twenty-four hours. It was held that the underwriters were not liable.

² *Shaw v. Felton*, 2 East, 109.

³ *Minett v. Anderson, Park, Ins.* 45. So where a vessel's papers were taken, and her hatches sealed down immediately upon arrival, and orders given on the examination of the papers to seize the ship and cargo, which was done, and condemnation of them fol-

lowed, it was held that the vessel had never been moored in safety. *Horneyer v. Lushington*, 15 East, 46.

⁴ *Cockey v. Atkinson*, 2 B. & Ald. 460.

⁵ *Matthie v. Potts*, 3 B. & P. 23; *Stewart v. Bell*, 5 B. & Ald. 238; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 33; *Osacar v. Louisiana State Ins. Co.*, 17 Mart. La. 386. In this case the vessel, whose cargo was insured, arrived in the roadstead of Soto La Marina, in Mexico, and anchored outside of the bar in the usual place twenty leagues from the town, and commenced to discharge her cargo in lighters, according to the usage of the trade. After part had been landed, the vessel was driven away by a tempest, and never heard from again. The court held that the plaintiff was entitled to recover for all the goods not brought to the town. But the court said that if the goods had been landed on the beach and transported to the town on the backs of mules, this would have been a land risk for which the underwriters would not have been liable.

⁶ *Sparrow v. Caruthers*, 2 Strange,

The policy terminates when the goods are landed at the usual place of discharge, although the consignees may not be able to obtain possession of them at once.¹ There is some conflict of authority in regard to the point whether the risk continues till the whole cargo is delivered, or whether it is severable in its nature. On principle and on the preponderance of authority, we are inclined to adopt the latter view.²

1236. But see *Langlois v. Brant*, cited 2 B. & P. 434, note. If he merely hires a lighter and pays for it himself, the risk continues till the goods are landed. *Rucker v. London Ass. Co.*, 2 B. & P. 432, note; *Hurry v. Royal Exch. Ass. Co.*, 2 B. & P. 430, 3 Esp. 289. In *Strong v. Nataly*, 4 B. & P. 16, the goods were taken out in a lighter hired in the usual manner, and the lighter brought to the wharf. Owing to the roughness of the weather, the goods could not be landed that night, and the lighterman asked the owner of the cargo whether he should stay and see the goods landed, to which the owner replied that he would look to the landing himself. In the night the lighter was sunk, and the court held that the underwriters were not liable, as the owner had taken the goods into his own care and possession. So, where the owner of goods, in consequence of the port of destination being blockaded, accepted them at an intermediate port, paying full freight, and thence transported them in lighters to their port of destination, it was held that he could not recover from the underwriter either the expenses of transshipping, and the freight paid for the lighters, or a premium of insurance paid for the risk in the lighters. *Low v. Davy*, 5 Binn. 595.

¹ *Gracie v. Marine Ins. Co.*, 8 Cranch, 75. The insurance in this case was on the cargo of a vessel "at and from Bal-

timore to Leghorn," the risk to continue until the goods should be safely landed at Leghorn. By the laws of that place, ships and cargoes on arrival were obliged to perform a quarantine of thirty days before the cargo or any person on board could be admitted into the city. The cargo was taken from the ship in public lighters to the lazaretto by the officers of government; and, until the expiration of the quarantine, the consignees could not remove the goods, and freight could not be collected. The court held, under these circumstances, that the underwriters were discharged when the goods were deposited in the lazaretto. See also *Brown v. Carstairs*, 3 Campb. 161. In *Mobile Mar. Dock & Mut. Ins. Co. v. McMillan*, 27 Ala. 77, where goods were insured until safely landed at the port of New Orleans, the court held that the underwriters were discharged from liability after the cargo was discharged on the wharf, on the shore of Lake Ponchartrain. By the usage of trade, goods were sent forward from that place to the city of New Orleans by railroad, but the court held that land risks were not covered by the policy. And in *Oscar v. Louisiana State Ins. Co.*, *supra*, p. 61, n. 5, the court said that, if the goods were to be taken overland on mules to the port of delivery, the underwriters would not be liable, though the risk would continue if they were taken by water.

² The contract is considered as an

The risk terminates as soon as the voyage insured is abandoned or broken up by a peril not insured against.¹ If goods are insured on board a ship to a port, and from thence on board another ship to a final port, the risk continues while the goods are being removed in the usual manner from one ship to the other.² Where the vessel is wrecked and the cargo is sent forward in another vessel to the port of destination, the underwriters are liable for a loss while the goods are in such substituted ship.³

entirety in *Gardiner v. Smith*, 1 Johns. Ca. 141, and in *Fletcher v. St. Louis Mar. Ins. Co.*, 18 Mo. 193, and it is treated as severable in *Gracie v. Maryland Ins. Co.*, 8 Cranch, 84; *Oscar v. Louisiana State Ins. Co.*, 17 Mart. La. 386; and *Mobile Mar. Dock & Mut. Ins. Co. v. McMillan*, 27 Ala. 77.

In *Ward v. Wood*, 13 Mass. 539, the policy stated that the risk was to cease when the vessel should receive on board a cargo, with the intention of proceeding to the United States. This was held to mean a full cargo.

¹ See *Brown v. Vigne*, 12 East, 283, and cases cited *ante*, Vol., 1 p. 585, n. 4.

² *Tierney v. Etherington*, cited 1 Burr. 348. In this case goods were insured in a Dutch ship from Malaga to Gibraltar, and at and from thence to England and Holland, both or either. It was agreed that on the arrival of the ship at Gibraltar the goods might be unloaded and reshipped in one or more British ship or ships for England and Holland. On arrival at Gibraltar, there being no British ship there, the goods were put into a store-ship which was considered as a warehouse, and while there were lost in a storm. The underwriter was held liable. See *Oliverson v. Brightman*, 8 Q. B. 781, and cases *ante*, Vol. 1, p. 563, n. 1.

³ *Plantamour v. Staples*, 1 T. R. 611, note, 3 Doug. 1. The ship and cargo were in this case insured at and from

Marseilles to Madeira, the Cape, and the isles of France and Bourbon, and to all parts and places in the East Indies and Persia, or elsewhere beyond the Cape of Good Hope, from port to port, and during her stay and trade to all ports and places, until her safe arrival back at her last port of discharge in France. The vessel sailed with a cargo consisting of bullion and merchandise consigned to the plaintiff's correspondents at Pondicherry, with directions to barter and sell the same on their account, and to make the returns in other goods, the produce of India. The vessel was lost at the Isle of France, but the cargo was sent on in another vessel by the master to Pondicherry. It was there received by the plaintiff's correspondents, and the proceeds invested in other goods, and forwarded to France in another vessel. This vessel was also condemned at the Isle of France, and the goods sent on in another vessel. This last was captured, and, with the cargo, condemned. Held, that the policy continued to attach, notwithstanding the change of vessels, and that the underwriter was liable. And if in consequence of a disaster the ship cannot pursue her voyage to the port of destination in a direct manner, the underwriters on goods are liable notwithstanding the deviation. *Winter v. Delaware Mut. Ins. Co.*, 30 Penn. State, 334. So, if it is necessary on account of the loss

The parties may agree that the risk shall terminate at the option of the insured on part of the subject of the insurance, and they may do this by express terms or by the use of language which is fairly susceptible of this meaning. In a recent case in Massachusetts, the policy was a valued one on the outfits of a whaling ship, giving liberty to touch at all ports or places for refreshments, and to sell her catchings, or ship them home at the risk of the assured. The policy also provided that one fourth of the catchings should replace the outfits consumed, except that catchings shipped home from the Cape de Verd Islands, or this side thereof, should be at the risk of the assured, without diminution of the value of outfits at the time. It was held that the assured had the liberty to send home all the catchings from the Cape de Verd Islands, or three fourths afterwards, without diminishing the valuation in the policy, and that the risk terminated on the part sent home.¹ The policy, if on time, frequently provides that if the vessel, at the expiration of the time, is on her way to her port of destination, the policy shall continue to attach until her arrival at that port. The question may then arise, what is her port of destination? In a recent case, a vessel so insured sailed under a charter-party providing that on her arrival at Woosung the captain should take his orders from the chief of the French Marine Service at that port, who would indicate to him within twenty-four hours whether he should discharge there or go thence to another port; and that this officer might keep her at Woosung as long as he should wish, and send her to any other safe and accessible port. This extension of the insurance was construed by the Supreme Court of Massachusetts to mean, that, if no orders to go to another port were received within twenty-four hours after notice of her arrival at Woosung to that officer, that port was her port of destination, and terminated the insurance.²

of the ship to carry the cargo over land to tranship it, the underwriters are liable while this is being done. *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543, 555.

¹ *Mutual Marine Ins. Co. v. Munro*, 7 Gray, 246.

² *Wales v. China Mut. Ins. Co.*, 8 Allen, 380.

Possibly a distinction might be made in this respect between policies on time and those on a voyage ; because in the former

policy, in consequence of which she sunk the same day, but after the risk had expired. It was held, that as the damage done by the accident, excluding that occasioned by the sinking of the boat, did not amount to fifty per cent, the assured could not abandon.

In *Furneaux v. Bradley*, B. R. East., 20 G. 3, 2 Marsh. Ins. 584, the vessel was driven on the rocks and injured, but her condition could not be examined into till after the expiration of the policy. She was then found to be much damaged, but not irreparably so, but, a difficulty having arisen on account of the want of materials, she was sold. Held, that the damage sustained by the running on the rocks should be estimated as an average, and not as a total loss. In *Coit v. Smith*, 3 Johns. Ca. 16, horses were insured against all risks, until safely landed. During a gale, one of the horses was thrown down and injured, and he died after he was landed. It was held, that the death of the horse was to be put out of the case, and that the underwriters were liable for the injuries which he had sustained up to the time he was landed.

In *Knight v. Faith*, 15 Q. B. 649, the jury found a special case, to the effect that the vessel was insured on time, from September 24, 1845, to September 24, 1846. The vessel was stranded and brought into the harbor of Santa Cruz on the 16th of September, 1846. She remained there in safety till the middle of October, at which time, the cargo having been got out, it was found that the necessary repairs could not be made there, as there was no dock-yard, workmen, or materials at that place, and that she could not be taken to any other

place to be repaired. She was accordingly sold by the master, who was also a part owner, for £ 77, 10s. No abandonment was made. It was held to be a case where the insured could not recover for a total loss, without an abandonment, but the underwriter was held liable for a partial loss. Speaking of *Meretony v. Dunlope*, Lord Campbell, C. J., said: "We very much doubt whether any such doctrine ever was laid down by Lord Mansfield, and the decision of the court may have proceeded on a totally different ground. The doctrine seems contrary to the principle of insurance law, that the insurer is liable for a loss actually sustained from a peril insured against during the continuance of the risk ; and if a ship insured for time, during the time, receives damage from the perils of the sea, although the amount of it be not ascertained till the expiration of that time, and she is kept afloat till then, upon the assured's taking proper steps by giving notice of abandonment, or by obtaining evidence of the sum which would be required to repair the damage sustained, there does not appear any good reason why they may not, according to the facts, proceed against the insurers for a total loss or for a partial loss." We apprehend that Lord Campbell, by the words "amount of it be not ascertained" means not only, when the amount of money needed for repair be not ascertained, but when the extent and character of the injury are not and cannot be ascertained until the direct consequences are fully developed.

It was also contended in this case, that as a total loss had taken place, for which the defendants were not liable,

the liability of the insurer expires at a certain hour, wherever the ship may be ; but in the latter the policy expires when the ship has been moored twenty-four hours in safety ; but she has never been moored in safety, if so injured that her destruction was inevitable.¹

Upon the question of forfeiture and seizure, we have seen that the cases, although in some conflict,² tend to the doctrine that the statute, together with the act or circumstance which forfeits the ship or cargo, has no effect in changing the property, or upon the rights or liabilities of owners or insurers, until actual seizure. If this be law, and the circumstance which causes the loss by forfeiture occurs while the policy attaches, but there is no seizure until after the policy expires, the insurers are not liable.³ If the ship arrives at her port of destination in a disabled state, and is detained there for repairs a longer time than would have been the case had no damage been sustained, and while there is seized in consequence of an embargo being laid, it has been held that the underwriters are not responsible for the loss by seizure.⁴

the partial loss must be considered as merged in the total loss, and consequently that there was no liability at all, on the authority of *Livie v. Janson*, 12 East, 648, which case decided that, where a partial loss occurred and there was afterwards a total loss by an excepted peril, the underwriters were not liable at all. But the court held, that there was no total loss in this case, as there was no such loss known in insurance law as a sale by the master ; and that, if there had been a total loss, the defendants were not at liberty to say, that the partial loss was not merged in the total loss.

¹ *Shawe v. Felton*, 2 East, 109. See also *Peters v. Phoenix Ins. Co.*, 3 S. & R. 25.

² See *ante*, Vol. I. p. 239, n. 2.

³ *Lockyer v. Offley*, 1 T. R. 252 ; *Mariatigue v. Louisiana State Ins. Co.*, 8 La. 65. See cases *ante*, p. 61, n. 3. The principal reason given by the court

for their decision in *Lockyer v. Offley* was that, under the English statute, a seizure might be made at any time within three years, and the rights and liabilities of the parties could not be determined till the expiration of that time, if they were liable at all after the voyage had ended, whence it was considered that great inconvenience would arise. The court said : " There must be some certain and reasonable limitation, in point of time, laid down by the court when the insurer shall be released from his engagement. If he be liable for a month, he may be for a year, and so on. And we all think that the law on insurances would be left unsettled, and in much confusion, if any other time were suggested than that prescribed by the policy, namely, the continuance of the voyage, and the ship's being moored twenty-four hours in safety."

⁴ *Roche v. Thompson, Millar, Ins. 205, Weskett, Ins. 196.*

CHAPTER III.

OF ACTUAL TOTAL LOSS.

TOTAL loss of maritime property under insurance is either actual (or, as it is sometimes called, absolute) or constructive (or, as it is sometimes called, technical). Let us first consider actual total loss.

Text-writers and courts, in treating of actual total loss, often use the word "destruction" as of equivalent meaning; but it is not so.¹ We do not now refer to the metaphysical objection, that nothing, strictly speaking, is ever destroyed; as the most that can happen to anything is a change in its elements or in the form of its constituent parts. For the purposes of practice, and of insurance law, a vessel is totally lost when it is lost *as a vessel*,² and goods are totally lost when they are lost *as goods*, and either vessels, or goods are totally lost, as to the insured, when he has lost all possession of, or power, or control of them, although they may continue to exist *in specie* as before. It is this last condition of loss to the assured that is usually intended when total loss is spoken of. "If," says Lord Abinger, "in the course of the voyage, the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound, by the very terms of his contract, to pay the whole sum insured."³ There must be

¹ Walker v. Protection Ins. Co., 29 Maine, 317. Mr. Arnould, in his work on Insurance, p. 990, enumerates two cases of actual total loss, thus: "1st, when the thing insured is wholly destroyed or annihilated by the perils insured against; and, 2d, when it is by the same perils wholly and irretrievably lost to the assured, so that it is totally out of his power or that of his underwriter to procure its arrival." Arnould on

Ins. *1001. So Benecké: "When the property insured is either totally destroyed, as by shipwreck without salvage, or irrecoverably lost, as by hostile capture and condemnation." Benecké on Mar. Ins. 336. See also Murray v. Hatch, 6 Mass. 465.

² Irving v. Manning, 1 H. L. Cases, 287.

³ Roux v. Salvador, 3 Bing. N. C. 266.

no rational hope, no practicable possibility, of recovering possession of the property, and prosecuting the adventure to its termination ; for only when such hope and possibility have ceased is it an actual total loss. If a ship in mid-ocean springs a leak, fills, and goes down, this is an actual total loss of ship and cargo. It never happens, perhaps, in such a case, that some part of the ship or cargo does not float from her. These things may have a considerable value, and may be saved by vessels which come near the place where she was submerged. It is nevertheless an actual total loss, for these parts or fragments cannot constitute a ship, and practically it is impossible that they should constitute a cargo. So if goods are in such a state from sea-damage, that, although they remain in the same species, they cannot with safety be re-shipped, and, if sent to their original destination, the species itself would disappear before they reached it, and on this account they are sold, this is an actual total loss.¹ So if she be burnt to the water's edge, and still floats, incapable of repair, this is an actual total loss of the ship as a ship.²

But if the ship be submerged near shore, and in comparatively

¹ In the case of *Roux v. Salvador*, 3 Bing. N. C. 266, cited above, a cargo of hides was insured from Valparaiso to Bordeaux, "free from average unless general, or the ship be stranded." The ship, springing a leak, put into Rio, when the hides were found to be in a state of incipient putrefaction, and were sold, and tanned by the purchasers. It was contended, at the trial, that this was not a total loss, because the hides still remained in specie, and if tanned could have been carried to Bordeaux. Lord Abinger, in his decision of the case, said : "If, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character ; — in these cases the circumstance of their existing in specie at that forced termination of the risk is of no importance. It appears to us therefore that this was not the case of what has been called a *constructive* [total] loss, but of an ab-

solute total loss of the goods." See also *Hagg v. Augusta Ins. Co.*, 7 How. U. S. 595 ; *Tudor v. N. E. Mut. Mar. Ins. Co.*, 12 Cush. 554.

² A vessel was wrecked in the Atlantic Ocean. The master and crew remained on board a day or two, when, there appearing no chance that the vessel could be saved, they abandoned her. Held, that this was an actual total loss. *Walker v. Protection Ins. Co.*, 29 Maine, 317. In *Murray v. Hatch*, 6 Mass. 475, *Seawall, J.*, says : "But in the technical sense of the words 'total loss,' and for every beneficial purpose in which a contract of insurance can be employed, a ship foundered and burnt at sea, or wrecked and broken upon the land, so as to be past relief or repair, is specifically and as a vessel totally destroyed ; and such an event is a total loss, . . . though there be a considerable salvage remaining."

shallow water, there is no actual total loss until it becomes certain that she cannot be weighed and recovered.¹ And if she be damaged by fire, and very badly, it is not an actual total loss if she is capable of repair.² It therefore follows that either submersion

¹ Submersion is not *per se* a total loss. *Vide* Emerigon, ch. 12, §§ 12, 13; *Goss v. Withers*, 2 Burr. 697; *Anderson v. Royal Exch. Ass. Co.*, 7 East, 38; *Davy v. Milford*, 15 East, 563. In *Sewall v. U. S. Ins. Co.*, 11 Pick. 90, the brig Marshal Ney, a new vessel, sailed from Boston for Baltimore on her first voyage. Three days after, she struck on a shoal, and, after bumping heavily there, was eventually driven over into deeper water, where she capsized and sunk in seven fathoms of water. The owners thereupon abandoned. The brig remained under water about six weeks, some two miles from land, and was then raised and brought to Boston by the defendants, who tendered her to the plaintiffs, offering to bear the expense of repairs. This offer the plaintiffs refused. Thereupon the defendants repaired the brig, and again tendered her to the plaintiffs, offering to account with them and the other owners as for a partial loss, which offer the plaintiffs refused. It was proved that the brig was well repaired, and perfectly sound, and nearly as good as new. *Shaw, C. J.*: "We think that the circumstance that a vessel is under water is not of itself sufficient to convert a partial into a total loss. . . . It will be admitted that when a vessel is sunk in the sea it affords strong *prima facie* evidence of total loss, because it would in general preclude all hope of recovering her. We think, therefore, it comes to this, that submersion, like stranding or other serious disaster, is to be taken in connection with other circumstances in determining whether the loss is or is not total. These circumstances, among

others, are the depth of the water, the distance from shore, the condition of the bottom whether soft or rocky, the roughness or smoothness of the sea, the season of the year, and whether the means of relief are at hand. The ultimate question is, Can she be raised and repaired at a reasonable expense of time and money?"

² The doctrine is laid down, in some of the earlier cases, that, so long as the thing insured continues to exist in specie, there can be no actual total loss. As in *Mitchell v. Edie*, 1 T. R. 613, 615; *Davy v. Milford*, 15 East, 565, 14 East, 466, 467. In *Tunno v. Edwards*, 12 East, 491, Lord *Ellenborough* says: "Is it not an established rule of insurance law, that when the thing insured subsists in specie, and there is a chance of its recovery, in order to make it a total loss, there must be an abandonment?" See also *Hughes on Ins.* 290. But this rule seems to have been stated too generally, and the more recent authorities have modified it. It is of no consequence that the thing exists in specie, provided no part of it comes into the hands, or is in any way available, for the benefit of the insured: it is still an actual total loss. *Bondrett v. Hentigg*, 1 Holt, 149. In *Mullet v. Shedden*, 13 East, 304, a cargo of saltpetre was seized at the Cape of Good Hope by a British cruiser, condemned and sold by decree of the Court of Admiralty, which decree was afterwards reversed by the Court of Admiralty in England, and the saltpetre was ordered to be restored, or its value paid to the owner. After the condemnation the insured claimed a total loss, though they made no abandonment; and

or fire is or is not a total loss, according to the circumstances of the case.

So stranding, which means, as thus used, the being cast on shore,¹ may or may not be an actual total loss. The mere fact

it was held that an abandonment was unnecessary, as the insured property had been wholly lost to the insured by the unshipping and sale of it at the Cape by the decree of the court. In *Cologan v. London Assurance Co.*, 5 M. & S. 447, where wheat which had been so damaged as to be worthless, though still existing in specie, was thrown overboard, and the insured abandoned and claimed a total loss, the court seem to have thought that the loss was actually total and the abandonment unnecessary. See *Cambridge v. Anderton*, 4 Dowl. & R. 203. In this case a ship was wrecked in the St. Lawrence, and, after a thorough survey, was judged to be unworthy of the expense of repairing, and sold. The insured, without abandoning, sued for a total loss. It appeared that the purchaser of the ship got her off at great expense, put a cargo on board, hired a crew at enormous wages in consequence of the unseaworthy character of the ship, and despatched her to England. She was found to be utterly unseaworthy, and was driven ashore on Prince Edward's Island, where she was totally lost. Held, that the insured was justified in claiming a total loss, and that abandonment was unnecessary, because, though still existing in specie, she was for all purposes of a ship valueless. See also *Dyson v. Rowcroft*, 3 Bos. & Pul. 474. Strictly analogous to these cases is that supposed in the text of loss by fire. And whether there be an actual total loss must depend upon the same circumstances as in loss by wreck, by submersion, or by decay; and the mere fact that the thing insured exists in specie does not

prevent a loss from being total. See Lord *Kenyon*, in *Cocking v. Fraser*, in *Burnett v. Kensington*, 7 T. R. 210, 2 Arnould on Ins. 1008, 1010.

¹ To constitute a stranding the ship must be driven ashore by some force of the elements out of the usual course of nature, or by unforeseen accident, and must remain there some little time. "If the ship touches and runs, the circumstance" does not make a stranding. *Harman v. Vaux*, 3 Campb. 429. It may be difficult at times to decide just what length of time a vessel must remain aground to constitute a stranding. In *McDougle v. Royal Exch. Ass. Co.*, 4 Maule & S. 505, a minute and a half was held not to be long enough; while in *Baker v. Towry*, 1 Stark. 436, the remaining aground fifteen or twenty minutes, in consequence of which the vessel sustained material damage, was held sufficient to constitute stranding. In *Barrow v. Bell*, 4 B. & C. 736, half an hour was enough. The force that drives the vessel ashore must be something extraordinary; thus, when a vessel in charge of a pilot, going up a harbor, took the ground on two successive days at low tide, and on the third, having been moored at her wharf, took the ground again at ebb tide, made a list and was much injured, it being proved that it was usual for vessels to take the ground in this way in that harbor, this was held to be no stranding. *Hearne v. Edmunds*, 1 Bro. & Bing. 388, where a vessel grounded in a canal, in consequence of the water being necessarily drawn off, and struck on some piles which were not previously known to be

that she rests on land or rock, and at low tide is high and dry there, does not of itself constitute this total loss;¹ for the next

there, this was held to be a stranding, as the cause was out of the usual course of navigation. *Rayner v. Godmond*, 5 B. & Ald. 225. Even if there be no actual force so as to drive the vessel aground, still there may be a stranding from the mere accidental want of something that would prevent her from stranding. As in *Bishop v. Pentland*, 7 B. & C. 219, where a ship in a tide harbor, at her wharf, had been fastened by tackle to posts on shore to prevent her from falling over at low tide, the rope, not being strong enough, broke, and she fell over and was much damaged. Held, that this was a stranding, notwithstanding that the master's neglect in providing a weak rope might have been a remote cause of the accident. In *Hughes on Insurance*, p. 304, note, a case is referred to where a vessel was driven ashore in consequence of being run into by two brigs, and remained ashore nearly an hour, but was held not to have been stranded. The principle of this case is by no means clear, and its authority may be doubted. The vessel was driven ashore by an unforeseen accident, out of the course of nature, and remained ashore too long a time to be considered "a touch and go." And this certainly comes within Mr. Justice Bayley's definition of a stranding, which is: "When a ship takes the ground, not in the ordinary course of navigation, but by reason of some unforeseen accident." *Bishop v. Pentland*, *supra*. It matters not what the ship strikes on, whether the shore or piles, under water. *Dobson v. Bolton*, 1 Park, Ins. 238. See also *Bennett v. Kensington*, 7 T. R. 20, 1 Esp. 416; *Carruthers v. Sydebotham*, 4 M. & S. 77; *Kingsford v. Marshal*,

8 Bing. 458; *Wells v. Hopwood*, 3 B. & Ad. 20. See *Emerigon*, Tom. i. ch. 12, § xiii. for a definition of stranding.

The books recognize a "voluntary stranding," which is, when the ship "is intentionally run on shore, either to preserve her from a worse fate, or for some fraudulent purpose." *Marsh. Ins. B. 1*, ch. xiii. § 1; 2 *Phillips, Ins.* 1313, *et seq.* *Emerigon* also enumerates several kinds of stranding, — "Echouement purement casuel," "Echouement volontaire pour sauver le tout," "Echouement occasionné par la faute du capitaine," "Echouement avec bris," and "Echouement sans bris." Tom. 1, ch. 12, § 13. *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191; *Barnard v. Adams*, 10 How. 270, 302. For other principles and authorities concerning stranding, see *ante*, Vol. I. ch. 17, § 12, B., p. 629, and *post*, chapter on General Average.

¹ *Peele v. Merch. Ins. Co.*, 3 Mason, 42; *Wood v. Lincoln & Kennebec Ins. Co.*, 6 Mass. 479; *Patrick v. Com. Ins. Co.*, 11 Johns. 9. In this case, *Kent, C. J.*, says: "It is well understood that stranding is not *ipso facto* a total loss. It may be and it often is followed by shipwreck, or becomes by other means a total loss; but it is not of itself a total loss." See also *King v. Middletown Ins. Co.*, 1 Conn. 201. In *Peele v. Suffolk Ins. Co.*, 7 Pick. 254, a ship was cast away "on a ledge of rocks near Portsmouth, N. H., and immediately bilged. She was in such a desperate condition that it was nine chances out of ten that she would be totally lost and wrecked in twenty-four hours." In the decision of the case, *Parker, C. J.*, says: "That the ship, at the time of the offer to abandon, was in a state of peril to

high tide may lift her from the bottom, and if it cannot do this without assistance, it may be practically possible to use means to draw her off. If it be physically impossible to draw the vessel off, not in a theoretic, but in a practical point of view, or if she is so much injured by the wreck that she could not float or be repaired, this would be an actual total loss. It would be shown to be this by the test above given, which is always applied.¹

It is often very important as well as sometimes difficult to determine whether the vessel be thus totally lost; for if it be so, the insured may claim payment of the insurers as for a total loss, without further action on his part,² but not otherwise.³ And various phrases are used in different cases and by different writers to describe the condition of the ship thus actually totally lost. Thus it is said: "If the subject-matter of the insurance remain a ship, it is not a total loss; but if it were reduced to a mere congeries of planks, the vessel was a mere wreck. The name you may think fit to apply to it cannot alter the nature of the thing." And again:

justify that offer, cannot be doubted. She was upon the rocks, and whether she could be got off or not was altogether uncertain. Subsequent events must determine whether the loss was then total or not. The mere stranding, however perilous, is not of itself a total loss, for the vessel may be relieved and the damage may be small." The vessel was got off and repaired. See also *King v. Hartford Ins. Co.*, 1 Conn. 422.

¹ *Vide supra*, p. 70, n. 2.

² *Smith v. Manuf. Ins. Co.*, 7 Met. 448; *Peirce v. Ocean Ins. Co.*, 18 Pick. 83; 2 Arnould on Ins. *1001. In *Portsmouth Ins. Co. v. Brazee*, 16 Ohio, 81, a flat-boat, having on board a cargo of flour, insured, sunk. Without the knowledge of the owner of the flour, the cargo was raised and sold. The insured brought an action, claiming for a total loss; and it was held that the insured should recover, *Avery, J.*, saying: "There was no actual abandonment, indeed, but this is not always necessary. . . . There was nothing left but

the money" for which the flour had been sold, "and it would have been an idle ceremony to attempt a formal abandonment." So *Emerigon*: "En cas de perte entière le délaissement est une formalité inutile." See *Mellish v. Andrews*, 15 East, 18; *Mullet v. Shedden*, 13 East, 304, 310; *Abel v. Potts*, 3 Esp. 244; *Gordon v. Bowne*, 2 Johns. 155. The mere fact that there still exists a *spes recuperandi*, as, in case of capture, it is possible that the hostile government may restore the property captured, does not prevent the insured from recovering the whole amount of his insurance. See, in *Gracie v. N. Y. Ins. Co.*, 8 Johns. 237, the decision of Chief Justice *Kent*, denying the authority of *Watson v. Ins. Co. of N. A.*, 1 Binney, 47; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 267; *Wein v. Columbian Ins. Co.*, 12 Pick. 280; *Patapasco Ins. Co. v. Southgate*, 5 Pet. 604; *Gordon v. Bowne*, 2 Johns. 150.

³ 2 Marsh, Ins. ch. 14, § 1.

"I take the legal principle to be this: if, by means of any of the perils insured against, the ship ceases to retain that character, and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss, without notice of abandonment."¹ In another case it is said: "She was therefore no longer to be deemed a ship, but rather materials for another ship."² And elsewhere the phrases are used, "dismembered by the perils of the sea," "wrecked in pieces," "her planks and apparel scattered about in the sea."

It must be remembered that an actual total loss of insured property occurs, either if the thing insured is wholly destroyed as that thing, or if the property insured, while remaining in specie what it is, is wholly lost to the insured, which means that it is entirely out of his power or that of the insurer to recover the property.³

Of the last kind of total loss a good example is that of capture and condemnation.⁴ So, too, if the ship has not been heard from for a sufficient time, a legal presumption will arise of an actual total loss,⁵ and it is entirely immaterial whether circumstances and evi-

¹ *Cambridge v. Anderton*, 2 B. & C. 691.

² Per Lord *Tenterden*, in *Allan v. Seegrue*, *Dans. & L.* 192.

³ *Arnould on Ins.* *1001; *Benecké on Mar. Ins.* 336; *Roux v. Salvador*, 3 Bing. N. C. 266; *Hagg v. Augusta Ins. Co.*, 7 How. 595; *Tudor v. N. E. Mut. Mar. Ins. Co.*, 12 Cush. 554; *Walker v. Protection Ins. Co.*, 29 Maine, 317; *Bondrett v. Hentigg*, 1 Holt, 149; *Mullet v. Shedden*, 13 East, 304; *Cologan v. London Ass. Co.*, 5 M. & S. 447; *Cambridge v. Anderton*, 4 Dowl. & R. 203; *Dyson v. Rowcroft*, 3 Bos. & Pul. 474.

⁴ In *Goss v. Withers*, 2 Burr. 683, it is decided that the property in the ship is not changed till decree of condemnation. In the United States a "sentence of condemnation is necessary to transfer property captured as prize, and originally belonging to neutrals." Sto-

ry's note to *Abbott on Shipping* (6th American ed.), p. *26; *Hudson v. Guestier*, 4 Cranch, 293; *Wheelwright v. Depeyster*, 1 Johns. 471; *Rose v. Himely*, 4 Cranch, 508. As to how far a sentence of condemnation is necessary to change the title to property between enemies, there seems to be conflict of authority. See *Story's note to Abbott on Shipping* (6th Am. ed.), p. *26. If, therefore, a ship be captured and lawfully condemned, the insured has suffered an actual total loss, and an abandonment would seem to be nugatory. The extent of the meaning of the word "capture" has been considered when treating of the risks insured against.

⁵ What this time shall be, must, of course, depend on the circumstances of each case, such as the length of the voyage, &c. In *Gordon v. Bowne*, 2 Johns. 150, a vessel sailed on a voyage from a port in North Carolina to New

dence lead to the probability that the vessel was sunk, or burnt, or destroyed by wreck, or, on the other hand, was taken possession of, and run away with, by mutineers or by pirates; for in either case, let the vessel be where or what it may, she is totally lost to the owner.

So where a ship was wrecked and a considerable part of the goods were saved, and got on shore, but were there in part destroyed and in part stolen, this was held to be an actual total loss of the cargo, because "the portion of the goods which were saved from the wreck, though got on shore, never came again into the hands of the owners. It is therefore a total loss to them."¹

There are several cases applying the same principle of law and working out by it this distinction; where goods are seized and confiscated by a foreign government, either because it is hostile or for any other reason, and some efforts are made or some process begun to recover the property so seized, which are in the end successful, if the action is brought as for actual total loss before the property or any material part of it is restored, this action may be maintained; but if the action be brought after such restora-

York, and was never again heard from. Held, that a lapse of a year from the time she sailed was sufficient to raise a presumption of total loss, and entitle the insured to recover without abandonment. In *Brown v. Milson*, 1 Caines, 525, a vessel was insured on time, four months, from Norfolk, Va., to New York. She did not arrive within the time insured. Two severe storms had occurred, one within the time and the other without. It was proved that the usual time of such a trip was from five to seven days, while there had been an instance of a safe arrival after a passage of sixty days. The judge observed that it was for the jury to determine which storm had destroyed the vessel, and that, if a vessel did not arrive within the usual limits of the voyage she was prosecuting, she ought to be presumed to be lost. In *Hurstman v. Thornton*, 1 Holt, 242, a vessel insured from Havana to the Netherlands, and not heard of for

nine months, was presumed to be lost. See also *Green v. Brown*, 2 Strange, 1199. But it must be proved that the vessel actually sailed on the voyage insured. *Koster v. Innes*, Ry. & Moody, 333; *Koster v. Reed*, 6 B. & C. 19. It is not necessary to show that the vessel never arrived at the port of destination; it is enough to prove that she never was heard from at home after she sailed. *Twemlow v. Oswin*, 2 Campb. 85; *Newby v. Read*, 1 Park, Ins. (8th Eng. ed.), p. 148. See *Paddock v. Franklin Ins. Co.*, 11 Pick, 227; and in *Ruan v. Gardner*, 1 Wash. C. C. 145, where a vessel was proved to have been taken by a privateer, it was held that this afforded sufficient evidence of a total loss after three years, during which nothing had been heard of the vessel or cargo, to enable the assured to recover without abandonment, and without proving a condemnation.

¹ *Bondrett v. Hentigg*, 1 Holt, 149.

tion has been made, there is no longer an actual total loss, but at most a constructive total loss, that is, a loss which may be made total by abandonment.¹ This kind of total loss we shall speak of presently, saying now only that we should think the principles which determine what is actual total loss would prevent this from being so considered, so long as there was a reasonable prospect of

¹ In *Tunno v. Edwards*, 12 East, 488, the defendant shipped sixty hogheads of sugar at London for Rotterdam, and got it insured at a value of £1,500. The plaintiff was one of the underwriters. The sugar was seized, confiscated, and sold by order of the government of Holland. The underwriters thereupon agreed with the defendant to pay him £50 per cent on account, which was done. A few months after, the Dutch government consented to restore half the proceeds of the cargo of sugar, and the sum of £1,551 and upwards was paid to the consignees of the sugar at Rotterdam, and by them transferred to the defendant. The plaintiff sued to recover the £50 per cent that he had paid.

Lord *Ellenborough* said: "But now, though the assured has lost half his goods, and only half, and the underwriter has paid but for half, the latter claims to be repaid his £50 per cent, upon the ground that this was a total loss, and that the assured has received the full value of the sum insured out of the proceeds of the other half; but in order to have made it a total loss, there ought to have been an abandonment, which there has not been; therefore there is no ground for the underwriter's claim." In *Mullet v. Shedden*, 13 East, 304, an American, having a license under the authority of the British government to export saltpetre from Calcutta to America, shipped a cargo, and got it insured, with leave to stop and trade at all ports, &c. The cargo was seized

and condemned at the Cape of Good Hope; but the sentence was afterwards reversed on appeal, and the property ordered to be restored on payment of costs, &c. After the reversal of the decree, a notice of abandonment was given to the defendant, an underwriter; no part of the saltpetre or its proceeds having been received from the Cape by the owner or his agents. The question which came before the court was, whether the plaintiffs were entitled to recover a total loss. In the course of the argument Lord *Ellenborough* remarked: "The assured stands upon the actual destruction, as to him, of the thing insured, which precludes the necessity of any notice to abandon it." And *Bayley, J.*, remarked: "No circumstance has happened since to make the original detention less than a total loss." And in the final judgment by Lord *Ellenborough*: "If instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought that there was much in the argument, that in order to make it a total loss there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away." See also *Melish v. Andrews*, 15 East, 13.

recovering the property.¹ We believe the weight of authority as well as the practice and usage in this country, and perhaps now in England, would make abandonment necessary.²

¹ Hughes on Ins. 293, 295. The case of *Goldsmid v. Gillies*, 4 Taunt. 803, was an action on a valued policy of insurance on a quantity of coffee that had been confiscated and sold by the enemy. But the foreign consignee of the coffee was permitted to retain from the proceeds the amount of his acceptances on bills drawn by the plaintiffs. The defendant, after advice of the seizure, adjusted a loss of 85 per cent on account. A verdict was taken for the plaintiffs for £ 44, 16s., subject to the opinion of the court whether the plaintiffs were entitled to recover from the defendant the amount for which the verdict was taken, or any and what other sum. *Heatte, J.*, said: "It is in the plaintiff's option to make it either an average or a total loss, and he makes it an average loss." *Gibbs, J.*, said: "If the plaintiff had brought an action after this salvage for a total loss, the defendant would have nonsuited him for want of an abandonment. I do not state that, upon seizure by the Danes or Swedes, the plaintiff might not sue for a total loss without abandonment; but after the restoration, no abandonment having been declared in the mean time, that which was for a time a total loss became an average loss; and then all that is restored is restored for the benefit of the assured, not of the underwriter." See preceding note.

² The practice in this country seems to be invariably to abandon in case of loss by capture, as for instance in the cases following: *Mar. Ins. Co. v. Tucker*, 3 Cranch, 357; *Post v. Phoenix Ins. Co.*, 10 Johns. 79; *Lee v. Boardman*, 3 Mass. 237; *Dorr v. N. E. Mar. Ins. Co.*, 4

Mass. 221; *Lovering v. Merc. Mar. Ins. Co.*, 12 Pick. 348. The number of cases, however, which hold abandonment necessary is not very great; still, as there seems to be no case which decides that a simple capture is an actual total loss, if action is brought before restoration is made, the principle in the text must be considered as the American law. The following cases illustrate the subject: In *Rhineland v. Ins. Co. of Pa.*, 4 Cranch, 29, Chief Justice *Marshall* says: "When there is a complete taking at sea by a belligerent, who has taken full possession of the vessel as a prize, and continues that possession to the time of the abandonment, there exists in point of law a total loss." And there is a similar dictum in *Marshall v. Del. Ins. Co.*, 4 Cranch, 202. But a stronger case is *Tucker v. United M. & F. Ins. Co.*, 12 Mass. 296, where a ship had been captured, taken to England, and afterwards liberated. No abandonment was made during the detention by capture; but after the release of the vessel, the French decrees making it dangerous for her to sail, her cargo was sold in England. The plaintiff claimed a total loss, but the court say: "We do not think that this temporary detention by capture, no abandonment having been made during its existence, can have any effect." But the strongest case, and one which seems to settle the question, is that of *Barney v. Maryl. Ins. Co.*, 5 Harris & J. 139. The facts were as follows: The schooner *Hawk*, insured by the defendant, sailed from Baltimore, and on her voyage was captured by French vessels and taken to Spain, to a

There is yet another kind of loss by which it may not, perhaps, be quite certain whether it may be of itself an actual total loss. It occurs when a wrecked vessel is sold by the master under circumstances and in a manner which justify the sale.

It is quite certain that, by the maritime law which governs all commercial nations, the master of a ship has no authority *as master* to sell either the ship or the cargo. This is no part of the duties of his office.¹ But it is equally certain that he has this

port there held by the French. The captors detained her for some time, till at length she was taken into the service of the French government by order of the Minister of Marine, and was never restored. Two or three notices of abandonment were given to the defendant, which defendant did not accept. The policy contained a warranty, "not to abandon in case of capture until condemned." The plaintiff claimed for a total loss. *Buchanan, J.*, said: The fact that the *Hawk* was "taken into the service of the French government, by order of the Minister of Marine was not a condemnation within the terms of the policy. . . . The plaintiff therefore had no right to abandon, and the case stands as if there had been no abandonment, or offer to abandon. . . . But it is said that the stipulation by the plaintiff not to abandon could not operate to prevent his recovering as for a total loss, in any case in which abandonment would not be necessary, as where nothing remained to be abandoned, and that this is such a case. That admitting the order of the Minister of Marine not to be a condemnation within the terms of the policy, yet that the taking the vessel into the service of the French government placed her so entirely without the control of the plaintiff, as to be equivalent to a final sentence of condemnation. But there is a mistake in the supposed legal effect of the order of

the Minister of Marine. It did not divest the plaintiff of his right of property. The vessel was not destroyed, but specifically remained, and the *spes recuperandi*, however remote and weak, was not extinguished. If, therefore, nothing else had stood in his way, the plaintiff could not have claimed as for a total loss without abandoning; for as it is settled that the insured can never recover for any greater injury than he has sustained, he must, before he can sue as for a total loss, renounce to the insurer all his right and title to whatever may be saved; leaving to him the *spes recuperandi*, that he may have the benefit of a recapture, or any other accident by which the thing may be recovered; and thus justice is done to both, — to the insured by giving him an indemnity for all the loss he has sustained; and to the insurer by putting him in place of the insured, in case anything should ever be recovered. The insured has his election to abandon or not, and, until he has made that election, no right can vest in him as for a total loss." The reasoning in this opinion is sound, and the doctrine it inculcates worthy to be the law.

¹ Abbott on Shipping, *7 *et seq.* The laws of Oleron, Art. 1, declare: "The master may not sell or dispose of the ship without a special procuration from the owners." See the translation of some of the Ancient Sea Laws in Ap-

authority from necessity, in cases which leave to him no other alternative but to sell the ship as she lies, or let her inevitably perish, with no advantage or saving whatever to the owner.¹

Before considering the effect of such a sale upon the rights and relations of the insured and insurer, supposing the sale to be justified, it may be well to inquire what circumstances justify the sale. Many foreign ordinances in early times expressly prohibited the master from selling the ship under any circumstances.² And it seems probable, from the earliest English authorities, that the commercial law of England gave him no such power.³ A case in Jen-

pendix to 1 Pet. Adm. R.; *Laws of Wisbuy*, Art. 18; *Laws of Hanse Towns*, Art. 57; *Ord. de la Marine*, liv. 2, tit. 1, § 19; *Consulate del Mer*, cap. 156. It will be seen that each one of these codes contains a positive prohibition against a sale by the master, unless he has express authority so to do. See also *Arnould*, Ins. *189. The master is an agent of the owners for a particular purpose, and, of course, in the general principles of agency can do no act not within the scope of his office.

¹ The authority of the master to sell in case of necessity is completely established by a multitude of cases. *Story on Agency*, § 118, after stating the usual limit of the master's authority, says: "But he may, under circumstances of great emergency, acquire a superinduced authority to dispose of it [the ship], from the very nature and necessity of the case." *Milles v. Fletcher*, Doug. 231; *Green v. Royal Exch. Ins. Co.*, 6 Taunt. 68; *Idle v. Royal Exch. Ins. Co.*, 8 Taunt. 755. These three cases will be quoted at more length below.

American Ins. Co. v. Ogden, 15 Wend. 532; *Roux v. Salvador*, 3 Bing. N. C. 266; *Somes v. Sugren*, 4 Car. & P. 276; *Hunter v. Parker*, 7 Mees. & W. 342; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249; *Pierce v. Ocean Ins.*

Co., 18 Pick. 83; *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. 220; *Brig Sarah Ann*, 2 Sumn. 206; *Schooner Tilton*, 5 Mass. 475; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604; *New England Ins. Co. v. The Sarah Ann*, 13 Pet. 387.

² *Magens on Ins.*, 107; and see the *Sea Laws* cited in p. 78, n. 1, *supra*; also *Warder v. Goods, &c.*, 1 Pet. Adm. 37.

³ 2 *Magens on Ins.* 107. *Molloy*, B. 2, ch. 14, says: "He [the master] cannot sell without an authority or license from the owners," which are the very words used in the *Laws of Oleron*. In *Tremenhere v. Tresilian*, 2 Keble, 91; *S. C. Siderfin*, 432, the court held a special authority necessary to justify a sale by the master. This case is recognized as authority by Lord *Ellenborough* in *Hayman v. Molten*, 5 Esp. 65. In *Eakins v. East India Co.*, 1 P. Wms. 395, 2 Bro. Parl. Ca. 382, it is stated that the master had no power to sell the ship, but here it was found that there was no necessity for a sale. The case in *Jenkins*, *Centuries*, p. 165, mentioned in the text, seems to be the earliest case that admits the master's authority to sell even in an emergency. But it is now well settled that he may sell in case of necessity (see cases cited note 1, *supra*), and many courts have shown a disposition to relax the old rule so far as to allow him to sell whenever, in his judg-

kins's Centuries¹ says that he may do so in a case of *famine*; and this may be the beginning of the rule that he may sell the ship in the case of necessity. He always had, undoubtedly, the power to borrow money on the credit of the ship,² and in one case where a master gave a bill of sale of the vessel, Lord Raymond considered the instrument void as such, but valid as a hypothecation of the vessel.³ We are not aware of any other case in which such a course has been taken.

The English cases went on until they extended the authority of the master in this respect quite too far. It was held that if the sale of the ship by the master was in the exercise of an honest discretion, and for the benefit of all concerned, the sale was authorized.⁴ It is not so considered now,⁵ although there are cases which seem to approach this view.⁶ We suppose it to be now well-settled law, that the mere exercise of an honest discretion, with the purpose of benefiting all concerned, is not enough to justify

ment, that is the wisest course to pursue. Dr. *Lushington*, in the case of *The Catherine*, 1 Eng. L. & Eq. 679, 681, says: "In later days I think a wiser view of the question has been taken, because I take the law now to be that, where an urgent necessity exists, which the master cannot meet, it is competent to him to sell the vessel."

¹ Page 165.

² Consulate de la Mer. (Boucher), c. 156; Laws of Oleron, Arts. 1 & 22; Laws of Wisbuy, Art. 13; Laws of the Hanse Towns, Art. 57; Ord. de la Marine, liv. 2, tit. 1. And the Laws of Wisbuy allowed the master in a "case of great necessity" to sell part of the merchandise and pay the owner for it when he reached his destined port. Art. 35. See also Molloy, B. 2, ch. 14; Hobart, fol. 10, 11 (*Bridgeman's case*). In this case *Bridgeman*, a bottomry bond-holder, proceeded against the ship in the Admiralty Court. A prohibition against the admiralty was granted, on the ground "that by the Common Law

the master could not impawne the ship; for no property generall or speciall, nor such power is given unto him by the constituting of him master." But the court said: "I was of opinion clearly that the Admirall law is reasonable, that if a ship be at sea and take leake, or otherwise want victuall, or other necessaries, whereby either herselfe be in danger or the voyage defeated, the master may impawne."

³ *Johnson v. Shippen*, 2 Ld. Raymond, 982.

⁴ See Phill. on Ins. 1569, 1570, 1583; *Doyle v. Dallas*, 1 Mood. & Rob. 48; *Milles v. Fletcher*, Doug. 231.

⁵ See notes, *infra*.

⁶ See opinion of Chief Justice *Dallas* in *Read v. Benham*, 3 Brod. & Bing. 147 (1821), and in *Idle v. Royal Exch. Ass. Co.*, 8 Taunt. 755; *Am. Ins. Co. v. Center*, 4 Wend. 45. In this case the court say: "Where there is a technical total loss, the master is under no obligation to repair, where it is not for the interest of the owner to do so." But see next note.

the sale.¹ In the words of Dr. Lushington: "In later days a wiser view of the question has been taken; the law now being, that

¹ On pp. 78, n. 1, 79, n. 2 and 3, will be found the authorities for the statement that the early sea laws, as well as the old common law of England, recognized no authority in the master to sell the ship under any circumstances. When, with the increase of commerce and civilization, it became necessary to adopt a different rule, the tendency was at first in many cases to rush to the opposite extreme, and allow the master to sell when in his judgment it was best to do so. In *Milles v. Fletcher*, Doug. 281, Lord Mansfield instructed the jury that, "if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss." The facts were that the plaintiff's ship was captured by American privateers, stripped of her rigging and part of her cargo, afterwards recaptured and taken to New York, where she was delivered to her captain. The ship was found to be leaky, and she could not be repaired without unloading her cargo, and the owners had no storehouses in New York where it could be stored, nor had they any agent there to advise the captain. No sailors were to be had. The cost of repairs would have exceeded the freight. There was an embargo which would have detained the ship at New York till five months after the time she should have arrived at London, her port of destination. Under these circumstances the jury gave a verdict for the plaintiff. Lord Mansfield said further: "The captain, when he came to New York, had no express order, but he had an implied authority from both sides to do what was *right* and *fit* to be done." This case occurred in 1779. In 1815

the case of *Green v. Royal Exch. Ins. Co.* came up, and the court said: "It ought therefore to be left to the jury, whether a prudent man would have sold the ship in these circumstances, or have repaired her and proceeded with her." *Idle v. Royal Exch. Ins. Co.*, 8 Taunt. 755 (1819), recognizes the authority of *Milles v. Fletcher*, *supra*. In *Read v. Bonham*, 3 Brod. & Bing. 147 (1821), the court, Chief Justice Dallas, after expressing its approval of the cases above cited from Douglas and Taunton, says: "The jury have found that what was done was done in the exercise of an *honest discretion*, and for the benefit of all concerned; and I see no reason to overturn the conclusion to which they have come." In this case *Richardson, J.*, dissented from the majority of the court. Perhaps the case of *Am. Ins. Co. v. Center*, 4 Wend. 45, may lean this way. There is great confusion of language in the cases on this point, and the abstract of a case will sometimes contain two opposite doctrines. Some cases limit the master's right to sell to "absolute necessity," and then go on to say he may sell when that course appears to be the best.

It may be said that the master is bound to exhaust every other means of raising money before he can sell the ship; then, and not till then, he may begin to consider whether he would be justified in selling. See *Underwood v. Robertson*, 4 Campb. 138. 3 Kent, Comm. *173, recognizes the rule of "supreme necessity." In *Hayman v. Molten*, 5 Esp. 65, Lord Ellenborough said: "I am disposed to go as far as I can to support what has been contended for, that [in a case of urgent necessity an

where an urgent necessity exists, which the master cannot meet, it is competent to him to sell the vessel."¹ It is of course difficult,

extraordinary difficulty, where a ship had received irremediable injury] the captain, acting *bona fide* and for the benefit of the owners, might sell the ship. This is the disposition of my mind, but I cannot lay it down as positive law. At all events, it can only be justified by extreme necessity and the most pure good faith." This case was tried in 1803, some time previous to Chief Justice Dallas's decisions cited above. To the same effect will be found *Roux v. Salvador*, 3 Bing. N. C. 288; *Somes v. Seegrue*, 4 Car. & P. 276. In this case Chief Justice Tindal says: "A captain has no power to sell, except from necessity, considered as an impulse, acting morally, to excuse his departure from the original duty cast upon him of navigating and bringing back the vessel." See *Doyle v. Dallas*, 1 Mood. & R. 48, where the sale was by the owner. In *The Fanny & Elmira*, 1 Edw. Adm. 117, an American vessel got on the rocks on the Irish coast; and after a survey by competent persons, who estimated that it would require a sum exceeding the value of the vessel to repair her, and advised selling her, this was done. The vessel was got off by the purchaser, an American, sailed to Russia, was captured by the Danes and recaptured. The purchaser in Ireland then claimed her. In giving judgment Sir William Scott said: "It is contended that such a sale, made under the pressure of necessity, will convey a valid title to the purchaser. But in the first place it must be shown that there was a necessity, and then it remains to be considered whether it was such as by

law would give the master a right to sell. . . . There must be the clearest proof of the necessity; it must be shown, not only that the vessel was in want of repair, but likewise that it was impossible to procure money for that purpose." And he ordered the possession of the vessel to be restored to those who appeared by her register to be the owners, without prejudice to such rights as the purchaser had acquired, as shall appear to the proper court of justice in America. Also see of English cases the following: *Hunter v. Parker*, 7 Mees. & W. 322; *Cannan v. Meaburn*, 1 Bing. 243; *Meaburn v. Leckie*, 4 Dow. & R. 207, n.; *Tanner v. Bennett*, Ryan & M. 182; *Robertson v. Clarke*, 1 Bing. 445; *Cambridge v. Anderton*, 2 B. & C. 693; *Ireland v. Thompson*, 4 C. B. 149. In *Gardner v. Salvador*, 1 Moody & R. 116, Mr. Justice Bailey remarks: "If the situation of the ship be such that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the captain by means within his reach can make an experiment to save it, with a fair hope of restoring it to the character of a ship, he cannot by selling turn it into a total loss."

Most of the American cases are clear in insisting upon the rule of necessity. In Massachusetts, one of the leading cases is *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249, which occurred in 1824. The facts were as follows: "The brig *Enterprise* put into the harbor of St. Domingo, having lost her foremast. While lying at anchor she was struck

¹ *The Catherine*, 1 Eng. L. & Eq. 681.

if not impossible, to determine, by a precise and satisfactory definition, when the necessity is sufficient to have this effect. Tindal,

by a gale and blown on the rocks. She was got off and carried up to the town, when a survey was held. A report was made that the brig was badly damaged, and that it would cost more to repair her than she would be worth; and she was condemned to be sold. The purchaser repaired her at no great expense, and took her to Boston. The question was, Was the master justified in selling? The jury found for the plaintiff. A motion was made for a new trial, on the ground of a misdirection of the judge, who directed the jury 'that as the vessel had come to damage unquestionably by perils insured against, if the proceedings of the captain in relation to the survey were *bona fide*, and the surveyors conducted themselves honestly in examining the vessel, and reporting their opinion that she ought to be condemned and sold, the sale was justifiable,' &c. A new trial was granted. Chief Justice Parker, in giving the opinion of the court, observed: "It is certain that the master of a vessel as such has no authority to sell the vessel or the cargo, unless in a case of *extreme necessity*, and when he acts with the most perfect good faith for the interest of those who are concerned in the property." After reviewing several English and New York cases, in which the same principle is held, he goes on to say: "This necessity must be of a moral nature, resulting from certain facts and circumstances, which are to be judged of first by the master himself and afterwards by a jury, and perhaps with some strictness, on account of the danger there may be of an abuse of this authority, by collusion between the master and owners to the prejudice

of the underwriters, or by the fraud of the master alone, to answer some private purpose of his own, or to defraud the owners." This doctrine has been followed in Massachusetts in all the subsequent cases. *Winn v. Col. Ins. Co.*, 12 Pick. 279, where the court say: "It must be made to appear, not only that there was an actually existing inevitable necessity for breaking up the voyage and abandoning the ship, but that in determining upon that measure the master acted with competent skill and judgment, with due care, diligence, and attention, and with strict fidelity." Also *Hall v. Franklin Ins. Co.*, 9 Pick. 466; *Peirce v. Ocean Ins. Co.*, 18 Pick. 83. Among the cases in the United States courts, see *Pope v. Nickerson*, 3 Story, 465, 503. In this case, when proceedings were threatened under a bottomry bond, and the master sold the vessel, and applied the proceeds to the payment of the bond, Mr. Justice Story held that the master was excused, if not strictly justified, in selling the vessel; since, if he had not done so, the result would have been an expensive litigation and a forced sale. *Brig Sarah Ann*, 2 Sumn. 206; *Robinson v. Com. Ins. Co.*, 3 Sumn. 220; *The Schooner Tilton*, 5 Mass. 465. In *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, the court say: "Necessity and good faith must concur. . . . The professional skill, the due and proper diligence of the master, his opinion of the necessity, and the benefit that would result from the sale to all concerned, would not justify it, unless the circumstances under which the vessel was placed rendered the sale necessary in the opinion of the jury." *N. E. Ins. Co. v. Brig Sarah Ann*, 13

C. J., seems to think the question is solved when it is said to be neither a legal necessity nor a physical necessity, but "a moral necessity."¹ And Mr. Justice Story speaks of this phrase as having been much criticised; but he entirely approves of it, and says, "It seems to indicate precisely what such a case requires." He then goes on to define this moral necessity. He says: "It arises where a duty is incumbent upon a rational being to perform, which he ought at the time to perform. It presupposes a power of volition and action, under circumstances in which he ought to act, but in which he is not absolutely compelled to act by overwhelming superior force."² We do not see that this rule and definition throw any strong light upon the question. And, without attempting a specific definition of our own, we should say it must be an "urgent necessity," in the words above quoted of Dr. Lushington; "an imperious, uncontrollable necessity," in the language of Chief Justice Shaw.³ "The sale should be indispensably requisite; the reasons for it should be cogent; we mean a necessity which leaves no alternative, — which prescribes the law for itself, and puts the party in a positive state of compulsion to act."⁴ "The master may sell where the ship is a total wreck."⁵ And the Supreme Court of the United States have held that where the sale was of a vessel wrecked in a distant ocean, where there was no market or competition, and the person who had it in his power to save the crew and the cargo preferred to drive a bargain with the master, "the necessity in such a case may be imperative, because it is the price of safety; but it is not of that character which permits the master to exercise this power."⁶

Pet. 387; *Scull v. Biddle*, 2 Wash. C. C. 150.

¹ *Somes v. Seegrue*, 4 C. & P. 276.

² *The Ship Fortitude*, 3 Sumn. 248.

³ *Peirce v. Ocean Ins. Co.*, 18 Pick. 88.

⁴ *Hall v. Franklin Ins. Co.*, 9 Pick. 478.

⁵ *Cambridge v. Anderton*, 2 B. & C. 693.

⁶ In *Post v. Jones*, 19 How. 150, the vessel was wrecked on the coast of Behring's Straits. The form of auction

was gone through with, the captains of three other vessels being the bidders, and the ship and tackle were sold for five dollars, and a part of the cargo at a dollar and the rest at seventy-five cents a barrel. The sale was held invalid. The court said: "All the cases assume the fact of a sale in a civilized country where men have money, where there is market and competition. They have no application to wrecks on a distant ocean, where the property is derelict or about to become so, and the person who

Necessity then
will justify
sale of cargo
otherwise
in actual
total loss

Perhaps a distinction may be taken between the case in which the question whether the sale be justified comes up between the former owner and the purchaser, and the other case where this question arises between the insurer and insured.¹ It is this last case only that we are now considering. And here we are satisfied that the question whether a prudent uninsured owner would probably have sold the ship under the same circumstances, or, in other words, the question of an honest exercise of discretion, has little or no bearing on the main question, which is, Was the sale justified, and the total loss thrown on the insurers? And we should say it was not so justified, excepting by the urgent, imperious, and uncontrollable necessity spoken of in the cases above referred to.

At the same time we should admit that the validity of the sale for any purpose is not to be judged of merely by the event. That may be an important fact. It may show that the danger, and the necessity springing from the danger, were erroneously estimated; because the purchasers may succeed in recovering the vessel with more ease and less cost than were expected.² But if,

has it in his power to save the crew, and save the cargo, prefers to drive a bargain with the master. The necessity in such a case may be imperative, because it is the price of safety, but it is not of that character which permits the master to exercise this power."

¹ Where the master sells the ship, and the validity of the sale is disputed by the former owner, so that the only question is between him and the vendor, it may be said that the sale will be deemed valid, if the circumstances attending it were such that a jury would be warranted in finding that a prudent owner would have done as the master did. *Hayman v. Molten*, 5 Esp. 65. But we are not prepared to carry the doctrine of "prudent uninsured owner" further than this. And in a case of insurance, we should say, that, in judging of the necessity of the sale, what a prudent owner uninsured would have done, if present, should not be considered. We

are aware that this is said to be a test in numerous cases; but to show the fallacy of it, let us take the case of "memorandum articles," where the rule is that if the goods arrive in specie there is no total loss. Nor is it probable that in every case the best thing that can be done is to sell the goods; but it is certain that this will not be taken as a criterion. See *Wilson v. Millar*, 2 Starkie, 1; *Reid v. Darby*, 10 East, 143; *Freeman v. East India Co.*, 5 B. & Ald. 617; *Hunter v. Parker*, 7 Mees. & W. 322; *Abbott on Shipping*, *8.

² In *The Brig Sarah Ann*, 2 Sumner, 206, 215, affirmed on appeal, N. E. Ins. Co. v. *Brig Sarah Ann*, 13 Pet. 387, Mr. Justice *Wayne*, delivering the opinion of the court in this case, said: "Nor can the necessity of a sale be denied when the peril, in the opinion of those capable of forming a judgment, makes a loss probable, though the vessel may in a short time afterwards be got off and

when the sale was determined upon and took place, the circumstances were sufficient to indicate to a reasonable person, competent to judge of them, a necessity sufficiently stringent, the sale was justified. We should say also that this was a question of fact for the jury,¹ and perhaps that the presumption, as matter of law, would be that the master has done his duty in the right way.² Still we are of opinion that the burden of proof lies on the purchaser to show that the sale was necessary, if the question was between him and the original owner; and that it lay³ upon the original owner, if the question was between him and his insurer.⁴

Let us now suppose that the ship was justifiably sold by the master by reason of a sufficient necessity, springing from one of the perils insured against. Does this give a valid claim as for a total loss against the insurer, without abandonment? We should

put afloat. It is true, the opinion or judgment of competent persons may be falsified by the event, and that their judgment may be shown to have been erroneous by the better knowledge of other persons, showing it was probable that the vessel could have been extricated from her peril without great injury or incurring great expense; and the master's incompetency to form a judgment or to act with a proper discretion in the case may be shown. But from the mere fact of the vessel having been extricated from her peril, no presumption can be raised of the master's incompetency, or of that of his advisers." See *Idle v. Royal Exch. Ass. Co.*, 8 Taunt. 755. *Fontaine v. Phoenix Ins. Co.*, 11 Johns. 293; *Hall v. Franklin Ins. Co.*, 9 Pick. 466, 484; *The Henry*, 1 Bl. & Howl. Adm. 465; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249, 263; *Prince v. Ocean Ins. Co.*, 40 Maine, 481.

¹ *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249, 263. And in all the above-cited cases on this subject, the question was invariably submitted to the jury.

² *Robinson v. Commonwealth Ins. Co.*,

3 Sumn. 220. A decree by a foreign vice-admiralty court, applied for by the master, authorizing the sale, is not conclusive evidence of the necessity of the sale. *Idle v. Royal Exch. Ins. Co.*, 8 Taunt. 755; *Van Omeron v. Dorrick*, 2 Campb. 42. And see *Reid v. Darby*, 10 East, 143. Nor is a report by surveyors in a foreign port conclusive evidence that the ship is not worth repairing. *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249.

³ Dictum of Mr. Justice *Wayne*, in *N. E. Ins. Co. v. The Sarah Ann*, 13 Pet. 387, 402; *The Glasgow*, 28 Law Times (Adm.), 13.

⁴ The fact that the master acted fairly, though of weight, is not sufficient to establish the validity of the sale. And in all the cases on this subject the burden is tacitly admitted to rest on the insured, and reasonably; for a sale by the master is something extraordinary, which in the usual course of events is not allowed. *Dodge v. Union Mar. Ins. Co.*, 17 Mass. 478; *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543, 551, per *Putnam, J.*

say that it does give this claim.¹ But at the same time it is to be remembered that, in the language of Mr. Justice Bayley, "there is no such head of insurance law as loss by sale."² The insured has this claim against the insurer, because the loss by the wreck was an actually total loss of the ship as a ship. And this is proved by the fact that she was reduced by the peril to such a condition that nothing could be done with her but to sell her as she lay. The loss must in fact be total before the sale, and it must be a loss made total by a peril insured against; and *sale* is not such a peril.³ And we find in this principle, which we cannot doubt,

5
Ship is
actual
total
loss.

¹ In *Idle v. Royal Exch. Ins. Co.*, 8 Taunt. 755, where a ship was wrecked and justifiably sold by the master, it was held that the insured could recover for a total loss on the freight without abandoning. *Cambridge v. Anderton*, 1 R. & Mood. 60; *Roux v. Salvador*, 3 Bing. N. C. 288.

² *Gardner v. Salvador*, 1 Mood. & R. 117. And see Maule's argument in *Roux v. Salvador*, 3 Bing. N. C. 270.

³ It may be said that the cases which relate to the question of abandonment after a sale by the master are numerous and irreconcilable. But if it be remembered that it is the wreck by a peril insured against that makes the total loss, much of the difficulty will disappear. For the sale, if necessary, implies that the wreck could be turned to no account, either for the insured or the insurers. Immediately upon such a wreck the insured, of course, could recover without abandonment, and transfer the property to the insurers. This the law seems to take for granted as done, and casts upon the master the duty of doing the best he can for the insurers, where there is no one else to look after their interest. In England the question came up in *Allwood v. Fenckell* (1795), Park, Ins. 239; and *Hodgson v. Blackiston*, Park, Ins. 240, n. In these cases an abandonment was held to be necessary, but they were afterward overruled.

In *Martin v. Crockatt* (1811), 14 East, 464, there had been a sale, but Lord *Ellenborough* said: "When the thing exists in specie as it did here, I cannot say but that an abandonment is necessary. In *Bell v. Nixon* (1816), 1 Holt, 423, a vessel was badly damaged, driven into Limerick where there were no docks large enough for her, and after survey she was broken up and sold. The court were of opinion that an abandonment was necessary. In *Cambridge v. Anderton*, 1 R. & Mood. 60, the jury found that a ship had been justifiably sold by the master, and the court held that an abandonment was unnecessary. This decision was questioned in *Roux v. Salvador*, 1 Bing. N. C. 488, by *Tindal C. J.*; but, the case being carried to the Exchequer Chamber, the decision was reversed, and *Cambridge v. Anderton* was sustained. Lord *Abinger* said: "When the subject-matter insured has, by a peril of the sea, lost its form and species, where a ship, for instance, has become a wreck or a mere congeries of planks, and has been *bona fide* sold in that state for a sum of money, the assured may recover a total loss without any abandonment." *Roux v. Salvador*, 3 Bing. N. C. 266. See also *Gardner v. Salvador*, 1 Mood. & R. 116; *Doyle v. Dallas*, 1 Mood. & R. 48; *Tanner v. Bennett*, Ryan & M. 182.

It does not appear that if a ship were

additional reason for holding that the necessity for the sale, to work a total loss, must be as stringent and imperative as we have

sold on the ground that the expense of repairs would exceed her value when repaired, and on that ground alone, a total loss could be recovered without an abandonment. *Fleming v. Smith*, 1 H. L. Ca. 513.

In *Roux v. Salvador*, 3 Bing. N. C. 266, a distinction was taken between the case in which "it is wholly out of the power of the assured or of the underwriter" to procure the arrival of the thing insured, and the case in which goods "are not worth the expense of bringing them to their destination"; and it was said that an abandonment was necessary in the latter case, and the court did not go so far as to hold that a sale in such a case would dispense with notice of abandonment, and no English case appears to have carried the doctrine so far since. See *Rosetto v. Gurney*, 11 C. B. 176, 7 Eng. L. & Eq. 461, a case in which notice of abandonment was given.

In *Fleming v. Smith*, 1 H. L. Ca. 535, the vessel was repaired at an expense exceeding her value when repaired; and it was held that the insured were not entitled to recover as for a total loss, as no abandonment had been made in due season. Lord *Campbell* said: "According to all the old authorities, a constructive total loss can only entitle the owner to recover as for an actual total loss, by a notice of abandonment; for though, in the judgment of the insured, it may be better not to repair the vessel, the underwriters may, with different means, give directions to repair, or may direct and are entitled to direct how the wreck is to be disposed of. It would be an extreme hardship for them to be called on to pay as for a

total loss, without having the opportunity of making the most of the ship in its disabled state. The law therefore requires that notice shall be given, in order to convert a constructive into an absolute total loss. In *Cambridge v. Anderton*, a notice of abandonment was not necessary. But why? Because the ship met with a serious misfortune, and the captain, after having taken the best advice, thinking it not worth repairing, sold it at once and conveyed a good title to the purchaser. In such circumstances there was nothing to abandon. The underwriters could not have taken possession of it [the ship], for it was lawfully transferred to the purchasers."

In *Knight v. Faith*, 15 Q. B. 649, the vessel was injured and carried into port, and it was found that the necessary repairs could not be made there; nor could the vessel be taken to any other port where they could be made. She was accordingly sold by the master. No abandonment was made; and it was therefore held that the assured could not recover for a total loss. Lord *Campbell*, C. J., said: "For there is no such loss known in insurance law as a sale by the master, unless it be barratrous; and a *bona fide* sale by the master can only affect the insurers when it becomes necessary by prior damage, arising from a peril for which they were answerable." In *Irving v. Manning*, 1 H. L. Ca. 287, 6 C. B. 391, where the expense of repairs would have exceeded the value of the ship when repaired, an abandonment was made, and the insured recovered. So in *Young v. Twing*, 2 Man. & G. 593; and the insured may not be entitled to recover in all cases, even if he abandons, as where

above said. Nor can we adopt the language of Mr. Arnould, that if the master, "acting *bona fide*, and as a prudent owner would if

the damage of itself does not amount to a total loss, but the ship, on account of old age, is not worth repairing. *Cazalot v. St. Barbe*, 1 T. R. 187.

The doctrine that there need be no abandonment, in case of a sale by necessity, is supported by many cases. *Fuller v. Kennebec Ins. Co.*, 31 Me. 325; *Prince v. Ocean Ins. Co.*, 40 Mass. 481; *Mutual Safety Ins. Co. v. Cohen*, 3 Gill, 459. In *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249, it was held, that as the legal title passed to the vendees when a ship was necessarily sold, no interest remained in the insured, they had nothing to abandon, and consequently no abandonment was necessary. See *Orrok v. Com. Ins. Co.*, 21 Pick. 456, 464, per *Putnam, J.*; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 623. In *Smith v. Manufacturers' Ins. Co.*, 7 Met. 448, the vessel was condemned and sold. She could have been repaired at an expense less than her value when repaired, and no abandonment was made. *Shaw, C. J.*, delivering the opinion of the court, held, that the insured could not recover for a total loss, on the ground that the cost of repairs would not have exceeded her value when repaired, but expressed the opinion that but for this fact the insured would have been entitled to recover; and speaking of *Roux v. Salvador*, as first decided, said: "But the subject has undergone an elaborate discussion in a recent case, in which, after a full review of all the cases, it was held that, even where the property insured had been sold, and the news of the sale arrived as soon as that of the loss, and where there was a total loss, but not an actual total loss by the destruction of

the thing itself, there could not be a recovery for a total loss without abandonment, and this is well supported in principle as well as by the authorities." The above dictum, that, if the expense of repairs would exceed the value of the vessel when repaired, the insured might recover as for a total loss without an abandonment, is supported by *Bullard v. Roger Williams Ins. Co.*, 1 Curt. C. C. 148, where the vessel was condemned and sold. But in *Am. Ins. Co. v. Francia*, 9 Barr, 390, where the jury found that the cost of repairs would so far have exceeded the value of the vessel when repaired that no prudent man could have doubted as to the propriety of selling the vessel, and that the sale was made under circumstances which rendered it legal, the court held that the insured could not recover for a total loss without an abandonment.

The result of the authorities appears to be, that in England the assured need not abandon in case of a valid sale; but if there is no sale, he must abandon, if the vessel remain in specie, although the expense of repairs would exceed the value of the vessel when repaired. In this country, the authorities are so conflicting, that it is more difficult to deduce a general rule from them. The dictum of *Shaw, C. J.*, *supra*, seems inconsistent with the rule, that the valuation is conclusive as to the value of the vessel at all times, which is the settled law in Massachusetts. In *Greely v. Tremont Ins. Co.*, 9 Cush. 415, the ship remained in specie, and was sold by the master. The estimated amount of repairs, including the general-average charges, amounted to more than the value of the vessel, and to more than her

uninsured, sells the ship where she lies, the assured may treat this as an actual total loss of the ship, and recover the whole amount of the insurance without giving notice of the abandonment."¹ In this last phrase lies the gist of the question. That a sale may be helped by abandonment so as to throw the loss on the insurer we shall see; but the question we have been considering is, what constitutes, of itself, and without abandonment, an actual total loss.

It may be well to notice a question which has been raised, whether, if a vessel be wrecked in her own home port or near it, and retains the shape of a ship, although it would be impossible to repair her excepting at a cost which would be more than she would be worth when repaired, this would be an actual total loss. If wrecked in that place so that she fell to pieces, there would be no question.² And it would therefore seem that the question now under consideration is simply this, whether a greater degree of damage is necessary if it be received in or near her home port, to constitute a total loss of the ship, than would be necessary if the damage occurred at a distance from that port.

It is quite obvious that a vessel might often be repaired with less difficulty and less cost if the injury took place when she was in her home port than if she were then far from it. And the ques-

valuation in the policy. Held, that the sale did not render the loss an actual total one of itself, and that the general-average expenses were not to be added.

¹ 2 Arnould, Ins. *1010.

² So says Mr. Arnould also, who says in substance, that, "If a ship be wrecked in pieces off her home port, so that nothing but her fragments come to land, there can be no doubt that the assured may recover for a total loss without abandonment, and the wreck will then be a salvage loss for the benefit of the underwriters." But if the ship comes ashore in the shape of a ship, though wholly irreparable, except at a cost greater than her value, he says that the safer practice would be to abandon. See *Samuel v. Royal Exch. Ins. Co.*, 8 B. & C. 119; *Dickey v. United Ins. Co.*, 11 Johns. 358.

In *Meigs v. Mutual Mar. Ins. Co.*, 2 Cush. 439, a vessel was insured for a whaling voyage, the risk to continue on and during her voyage and back to Mattapoissett; on her return from the voyage, after coming into the harbor of M., being unable, for want of sufficient depth of water, to reach the wharf where she was to discharge her cargo, she anchored at some distance in the usual anchorage, and began to lighten herself in order to go up to the wharf. While doing this, with due diligence, she was destroyed by fire. It was held that her ultimate destination was the wharf, and until she had arrived there, and been moored twenty-four hours in safety, the risk continued. Nothing was said in the case about abandonment; and the assured recovered for a total loss.

tion of actual total loss always is, whether the ship be so far injured that she has ceased to be a ship, and cannot be again made a ship excepting by a repair which would be equivalent to rebuilding.¹ And, for the reason above stated, an injury received abroad may be irreparable which would not be so if received in her home port. To this extent it may be true that the same sea damage which would amount to actual total loss of the ship, if it were sustained while she was at a distance from home, might not have this effect if she were then at home.² Further than this, we see no reason for limiting or qualifying the general rule, that when the ship is at any place so far damaged by a peril insured against as to cease to be a ship, and not be capable of becoming a ship again without repairs which would cost more than she would be worth after they were made, this is an actual total loss of the ship. In the present nearly if not quite universal practice in this country, of making an abandonment in all such cases, this question could seldom arise, excepting where an abandonment was withheld through accident or inadvertence, or made at a time or in a manner which prevented it from being effectual.

¹ See *supra*, p. 69, n. 1, 2, &c.

² In *The Fanny & Elmira*, 1 Edw. Adm. 117, the facts of which are stated on p. 82, n. 1, Sir William Scott recognizes the difference between a wreck in a foreign port and one in the home port as affecting the master's right to sell, saying, in substance, that an amount of damage might justify a sale in the former case, which would be insufficient to do so in the latter. And the case of *Scull v. Biddle*, 2 Wash. C. C. 150, is to the same effect. This latter case, however, is overruled in 13 Pet. 387; but we submit that the overruling extends only to the assertion by Mr. Justice Washington, that the master can in no case sell when his ship is wrecked in the country where the owner lives. See also *Wood v. Lincoln & Kennebec Ins. Co.*, 6 Mass. 479, 482. In his opinion *Parsons, C. J.*, says: "A ship may be stranded on a part of the coast where no assistance can be procured to get

her afloat, or where there may be no materials or workmen for repairing the damage she may have sustained; and in a case like this the voyage is lost, and the assured may abandon. But if the ship be stranded in a place where sufficient assistance can be obtained, and she may in a short time be got off, and repaired for the prosecution of her voyage, as neither the ship nor the voyage is lost, there is no ground on which the owner can abandon his ship and recover for a total loss." This is a case of constructive total loss; but, if circumstances of time and place affect the owner's right to abandon, why should they not as well affect the question of actual total loss? See also, on this subject, *Shawe v. Felton*, 2 East, 108; *Allen v. Seegrue, Dans. & Ll.* 188; *Peters v. Phoenix Ins. Co.*, 3 Serg. & R. 25; *Ralston v. Union Ins. Co.*, 4 Binn. 386.

It is quite certain that the insured may claim as for actual total loss, if the property or interest insured be taken from him, although there may be a hope of recovery.

This doctrine has been recently very strongly affirmed in England in a peculiar case. The plaintiff was a shareholder in the Atlantic Telegraph Company. The policy provided that the risk should commence at the lading of the cable on board the Great Eastern, and should continue until it was laid down and in use, and his interest was valued at £ 200 on the Atlantic cable. Half the cable was lost by its breaking; one half was saved. It was held; first, that the policy was not on the cable, but on the plaintiff's interest in the adventure, and that the adventure was the attempt to lay the cable on the voyage; then, that the interest was an insurable interest; and lastly, that the *loss was total*, because, by the breaking of the cable, the probability of laying it was reduced to a mere chance. The court refer to the rule that the existence of a *spes recuperandi* does not prevent a loss from being total. They illustrate this rule by the case of a ship the capture of which constitutes actual total loss, although there exists a well-founded hope of recapture or release.¹

¹ In *Wilson v. Jones*, Ct. of Exch. Hilary T. 1866, *Martin, B.*, in giving the opinion of the court, said: "The second question is, whether the loss be total or partial. I think it total. The adventure in respect to which the insurance was effected was the successful laying down of the cable, which was loaded on board the Great Eastern, in one continuous length, between Ireland and Newfoundland; this has wholly failed, and, in my opinion, the circumstance that one half the cable has been saved is immaterial. The assurance was upon the adventure; and, even if it had been merely upon the cable, it was upon the entire, continuous cable, and not on a portion of it. It may possibly be, that the loss in the present case is not a loss by perils of the seas; but upon this it is unnecessary to give an opinion, as I think the misfortune which has occurred

is distinctly and plainly within the words of the policy." The words in the policy, to which the court refer, were these: "This policy shall cover every risk and contingency attending the conveyance and successful laying of the cable."

This case was appealed to the Exchequer Chamber, and the decision of it there confirmed. *Blackburn, J.*: "Even assuming the insurance to be on the adventure of laying the cable generally, and not limited to that particular occasion, is not the case analogous to the case of the capture of a ship with a *spes recuperandi*? In such a case, the loss is considered as total at the time of capture, and unless the recapture is made before action brought, or, by the American law, differing in that respect from ours, even though the recapture is made before action brought, the as-

Actual Total Loss on Cargo.

The same principles which pervade the law of insurance as to actual total loss of the ship are applied to actual total loss of the cargo, but with the difference which is made necessary by the difference in the nature of the property.

As before, goods may be totally lost by being submerged or by fire, but it should be remarked that the total loss of the ship in any way whatever does not necessarily produce or imply a total loss of the cargo. If she be submerged, a part of the goods may float away, and if she be burnt to the water's edge, a part of the cargo may still be recovered.¹

On the other hand, there may be a total loss of the cargo, although the ship be not totally lost. Let us suppose, for example, a cargo of fruit so much damaged by sea-water which came to it through seams in the ship, which had been opened by a tempest, that the fruit became wholly rotten, and when it reached the port of destination it had become a mass of corruption, utterly valueless, no part of which could be separated and regarded as one of the original fruits. We should have not the least hesitation in

insured is entitled to recover as for a total loss. Now, here the chance of recovering from this accident had not been realized before action brought." *Willes, J.*: "Assuming that there was a loss of the subject-matter of the insurance by the perils insured against, was there a total loss? It was probably rightly agreed, that if the insurance was on the cable, there was no total loss; but it is not necessary to examine this, because our construction of the policy is, that it was not the cable, but the plaintiff's interest in the adventure, which was the subject of insurance. If, then, we consider the adventure as limited to that one attempt, or if what was insured was the profit to be made by successfully laying down the cable on that occasion, there is clearly a total loss; if, on the other hand, what was insured was the whole adventure in which the plaintiff

was interested, and which was intended to be realized in that attempt, then, by the defeat of that attempt, there was a total loss, on the same principle on which a vessel is totally lost to the insured by capture by the enemy, although the presence of ships of war of its own nation makes it more probable that it will be recaptured than that it will be taken into a hostile port. It is a total loss at the time. However subsequent events might affect the result, the loss was presumably and conventionally total at the period when it occurred."

Blackburn, J., concurred in the foregoing, adding: "The insurance was, in my opinion, for that voyage, and there was, therefore, nothing to abandon." Judgment affirmed.

¹ As in *Thompson v. Royal Exch. Ass. Co.*, 16 East, 214; *Hedburgh v. Pearson*, 7 Taunt. 154.

saying, on general principles, that this was a total loss of the cargo.¹ But this question, both in England and in this country, has been made difficult by the law and the practice in respect to what are called memorandum articles.

It is obvious that of the many things carried in ships, and composing their cargoes, some things are more easily damaged than others, or are more injured by the damage they receive; and some are so perishable in their own nature that very slight damage suffices to cause their destruction, and it is always doubtful whether they will reach their port of destination, even if they meet with no sea damage on the way. If they perish from internal causes, entirely unaffected by sea damage, there is, of course, no claim whatever on the insurers for a loss so caused. But when such goods reach their destination, and are found to be more or less injured, it may be very difficult to determine whether any part of the loss, and, if so, what part or proportion of the loss, was caused by a peril against which the cargo was insured. The insurer of such articles could have no adequate protection, unless by a premium which should cover in fact, not merely the sea risks, but those thus arising from the nature of the goods, and such a premium would be, practically, too high to be paid. To avoid this difficulty, a custom was introduced among English insurers, more than a century ago, to add to their policies a memorandum respecting such articles.² By this it was provided that upon certain articles peculiarly perishable the insurer should not be answerable for any partial loss whatever, and that upon others still less perishable he should

¹ See cases cited below.

² The difference of risk pertaining to different kinds of goods has been recognized in insurance business for at least three or four centuries. The ordinance published in Florence in 1526 says, "that under the name of merchandise shall not be understood slaves, fruits, horses, corn, wines, salted fish, &c." "And whoever intends to have such sorts of goods insured shall be obliged to express them in the policy; or it shall *ipso jure* be of no validity." Similar regulations existed in most of the commercial states of Europe. But the use

of the "memorandum clause," as it exists to-day, began in England in 1749. In the policies of that day, corn, fish, tobacco, and hides were free from all average, unless general, or the ship be stranded; sugar, rum, hemp, and flax free from all average under five per cent, &c. See 1 Magens on Ins. 10; and the statement of Mr. Justice Buller in *Cocking v. Fraser*, 1 Park, Ins. ch. 6, § 13; 2 Strange 1065, note (1), to *Boyfield v. Brown*; Boulay Paty Com. de Droit Com. Mar. tom. 4, tit. 10, § 18, edit. 1823.

be liable for partial losses only if they were more than five per cent. These articles are commonly called memorandum articles. The custom in regard to them has varied from time to time in England and in this country, but it is usual now, both there and here, to provide that the enumerated articles should be free from average, either altogether or under a given percentage, *unless general, or the ship be stranded*. An average, not general, is a particular average, and this phrase is nearly, if not quite, synonymous with partial loss. The meaning of this clause therefore is, that the insurers are not liable for any partial loss of the enumerated articles, unless the vessel be stranded.¹ We consider elsewhere this clause respecting stranding, and also the effect of limiting the liability for partial loss, unless it amounts to a percentage. And also the question whether this clause excludes a constructive total loss.² What we have to consider, then, is its effect upon the question of actual total loss. This subject may perhaps best be treated under four separate heads:—

First, the English doctrine of loss at the port of destination.

Second, the English doctrine of loss at an intermediate port.

Third, the American doctrine of loss at the port of destination.

Fourth, the American doctrine of loss at an intermediate port.

¹ The memorandum clause came before the courts for construction first in 1754, in *Cantillon v. London Ass. Co.*, cited 3 Burr. 1553, where it is said the court "and a special jury looked upon this as a condition, and that, by the ship's being stranded, the insured was let in to claim his whole partial-average loss." In 1764, the question arose whether the exception "free from average, unless general," let in a partial loss, when there was also a general average. Lord *Mansfield* said: "The insurer is liable for all losses arising from the ship being stranded, and in all cases where there is a general average; but all other partial losses are excluded by the terms of the policy." *Wilson v. Smith*, 3 Burr. 1550. In *Bennet v.*

Kensington, 1 Esp. 416, 7 T. R. 210, it was held that, if the ship be stranded, this operates as a performance of a condition, and makes the insurers liable for a subsequent loss of the cargo, though the loss was in no manner a consequence of the stranding. This seems to be the judicial interpretation of the clause to-day, though unquestionably contrary to the intent of the originators of it. See also *Bowring v. Elmslie*, 7 T. R. 216, n.; *Nesbitt v. Lushington*, 4 T. R. 783; and Mr. Arnould's translation of the memorandum clause as interpreted by the courts, 2 Am. Ins. 859, and *Hoffman v. Marshall*, 2 Bing. N. C. 383. For the meaning of the term "stranding," see p. 71, n 1, *supra*.

² Vol. 1, ch. 17, § 12, B., p. 629.

Of the English Doctrine of Loss at the Port of Destination.

In the English case which is often referred to as founding the doctrine on this whole subject, we have always thought that Lord Mansfield was greatly influenced by a belief that this memorandum was intended by the insurers to protect them against any claim for loss to the memorandum articles, unless that loss amounted to their actual destruction. The insurance was upon fish. The ship on her voyage encountered heavy storms, and was compelled to throw a part of the fish overboard. The ship was obliged to change her course, and to put into Lisbon, which was not her port of destination. The fish still on board was in such a condition as to demand a survey by the board of health of that city, and was declared to be, and in fact was, utterly valueless through sea damage; and the fish was not forwarded. And it would seem from the facts of the case that it could hardly have been sent forward. But Lord Mansfield said: "What is a total loss? A total loss of the thing insured *is the absolute destruction of it by the wreck of the ship*. The fish may all come to port, though, from the nature of the commodity, it may be putrid, it may be stinking, *still, as the commodity specifically remains*, the underwriter is discharged."¹ This case was one of loss at an intermediate port, although the port of destination was very near to that into which the vessel went; but it established the law in England for a considerable time, that if memorandum articles arrived at their port of destination, although in a condition which made them utterly valueless for their ordinary use, the underwriters were not liable as for a total loss. It followed therefore that if at some intermediate port the goods were reduced to that condition, but still could be carried to their port of destination in specie, however valueless, there was no total loss.² We have already seen that it is the general

¹ Cocking v. Fraser, 1 Park, Ins. ch. 6, § 13.

² The case of Cocking v. Fraser, cited above, was a case of loss at an intermediate port; but if the question of loss at such a port depends upon the specific existence of the cargo, *a fortiori* does that of loss at the port of destination. In Mason v. Skurray, 1 Park, Ins. ch.

6, § 13, Marsh. Ins. 226, where a cargo of peas arrived at the port of destination so much damaged that it was not worth one fourth of the freight, it was held, that the underwriters were liable. In Glennie v. London Ass. Co., 2 Maule & S. 371, rice, insured free of particular average, arrived within the home port; but, before the ship could be

duty of the master not only to carry goods to their port of destination in his own ship if he can, but to forward them in another ship if he cannot carry them in his own.¹ It is obvious, however, that there can be no reason whatever for his doing so if the goods have already perished as to their value. But what right would he have had to throw them overboard, if carrying them or forwarding them to their port of destination in specie discharged the underwriters? If, therefore, he could have so carried them forward, but threw them overboard as worthless, the underwriters would still be discharged, because the total loss would then have occurred through the doings of the master, and not by a peril insured against.²

Such would be the law if the ruling of Lord Mansfield remained in force; but, says Mr. Arnould, "It seems better to consider this case as overruled in English law, than to endeavor to support it upon its facts." And he adds immediately after, that the language of Lord Mansfield is "undoubtedly opposed to the rule now understood to prevail."³ Lord Mansfield's decision was rendered in 1784 or 1785. In 1797⁴ Lord Kenyon dissented from the ruling of Lord Mansfield. In 1803 Lord Alvanley gave a decision which would seem to be decidedly irreconcilable with the decision of Lord Mansfield.⁵ Here the cargo was fruit. It was so damaged by sea-water that it had rotted, and become putrid, and the government prohibited its being landed. It was thrown into the sea. The facts here are certainly stronger than those in Lord Mansfield's case, but it was held that the insured might recover, and the language of Lord Alvanley would seem just as applicable to the former case as to this. He says: "The commodity was annihilated by being thrown overboard. Had it not been so annihilated, it would have been annihilated by putrefaction; and

moored or unloaded, she was wrecked, and the rice so damaged that its value was not enough to pay its freight. The insured claimed a total loss; but the court held that this was a case of particular average only, and the insured could not recover. See also *McAndrews v. Vaughn*, 1 Park on Ins. p. 155, ch. 6, § 13; *Marsh. on Ins.* 233.

seq.; *Rugely v. Sun Mut. Ins. Co.*, 7 La. Ann. 279.

¹ Unless the goods were insured against barratry. See 2 Arnould, Ins. *819 *et seq.*

² 2 Arnould, Ins. *1022.

³ *Burnett v. Kensington*, 7 T. R. 210, 222.

⁴ *Dyson v. Rowcroft*, 3 Bos. & Pul.

⁵ See *Abbott on Shipping*, *368 *et seq.*

is it not as much lost to the insured by being thrown overboard as though the captain had waited till it arrived at complete putrefaction? . . . I never have understood that the underwriters insure fish and other articles against no perils which do not end in a total annihilation of the commodity." It is true that Lord Alvanley makes some effort to reconcile his decision with Lord Mansfield's, but we think he entirely fails to do so. Then, in 1816, Lord Ellenborough said: "Considering the contract of insurance as a contract of indemnity, it surely cannot be less a total loss because the commodity subsists in specie, if it subsist only in the form of a nuisance. There is a total loss of the thing, if by any of the perils insured against it is rendered of no use whatever, though it may not be entirely annihilated."¹ Still more recently, in 1835, occurred the case of *Roux v. Salvador*. When this was tried before the Common Pleas, that court returned to the principles of the earlier authorities, and the insured were held to be not liable.² But the case went to the Court of Exchequer Chamber, and was there elaborately argued and decided.³ We suppose the law of that case to be the law of England now on that subject; and if it be so, then there is an actual total loss of the goods for which the underwriters are liable, without abandonment, if the goods are, by a peril insured against, so damaged that they no longer remain the same goods in fact and in substance, and as such goods are wholly valueless.

That such is the law in England at this time, if the goods are utterly valueless from the effect of sea damage, at an intermediate port, we think is clear; but that the same rule would be held to apply if goods in this condition reached their port of destination, may not be so certain. We think that even this may be inferred from the late English authorities.⁴

¹ *Cologan v. London Ass. Co.*, 5 Maule & S. 447, 455.

² 1 Bing. N. C. 526; S. C. 1 Scott, 491.

³ 3 Bing. N. C. 266; S. C. 4 Scott, 1.

⁴ The decision in *Cocking v. Fraser* has been doubted by Lord Kenyon, in *Burnett v. Kensington*, 7 T. R. 222, who says that he cannot subscribe to the dictum of Lord Mansfield, in *Cocking v. Fraser*, that, if the commodity specifically remain,

the underwriter is discharged; again, by Lord Alvanley, in *Dyson v. Rowcroft*, 3 Bos. & Pul. 474. And again, in *Cologan v. London Ass. Co.*, Lord Ellenborough says that he should incline to the opinion of Lord Alvanley, rather than to that of Lord Mansfield. To be sure, these cases are all cases of loss at an intermediate port; but it will be observed, that the ground on which the judges rest their objections to the doc-

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The principles which we have already considered, relative to the duty of the master to forward goods from an intermediate port to the port of destination, apply with still greater force to memoran-

trine of *Cocking v. Fraser* is, that the specific existence of the goods does not make the loss the less total, if the goods are absolutely valueless. Now, the locality of the goods, whether at an intermediate port or at the port of destination, can make no difference, if the question of total or partial loss depends merely upon the value of the goods, and not upon their formal appearance. The common-sense view of the question is this: the goods were shipped for sale as goods; so long as they will answer this purpose, they are not lost. When they cease to be fit for sale as goods, then they are lost, no matter what may be their outward appearance. In *Roux v. Salvador*, 3 Bing. N. C. 266, a cargo of hides was found to be so damaged, at an intermediate port, that they were unloaded and sold there, as it was impossible to carry them to their destination, without losing them by putrefaction. The assured recovered as for a total loss. The hides were insured free from average, unless general, or the ship be stranded. In the opinion of the Exchequer Chamber, as given by Lord Abinger, the Chief Justice says, that the question of total or partial loss does not depend upon the specific existence of the goods at the termination of the risk, but upon general principles. "The memorandum does not vary the rules upon which a loss shall be partial or total; it does no more than preclude the indemnity for an ascertained total loss, except on certain conditions. It has no application whatever to a total loss, or to the principle upon which a total loss

is to be ascertained." He goes on: "The argument [of the counsel] rests upon the position, that if, at the termination of the risk, the goods remain in specie, however damaged, there is not a total loss. Now, this position may be just, if by the 'termination of the risk' is meant the arrival of the goods at their place of destination, according to the terms of the policy." Lord *Alvanley*, it will be noticed, does not commit himself as to the soundness of this position with reference to the port of destination; he only goes on to deny that it has any application to the "termination of the adventure before" arrival at the port of destination, "by a peril of the sea"; and, soon after, he lays down this proposition: "But the existence of the goods, or any part of them, in specie, is neither a conclusive, nor, in many cases, a material circumstance, to the question; 'whether the loss is total or partial.'" And again he says: "The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle." From these extracts, it will be seen that much of Lord *Alvanley's* reasoning applies equally well, whether the loss takes place at an intermediate port or at the port of destination. And, drawing the best inference we can from the current of authority, we are led to the conclusion that, were a case now to occur in England of memorandum articles arriving in specie, but valueless at their port of destination, the insurers would be held liable for a total loss.

dum articles. If the underwriters are not liable if the goods finally arrive in specie, it would follow that it is the duty of the master if possible to effect that object by carrying them on. But if they must be of value on arrival, then, to determine whether they should be carried on, the expense of so doing must be taken into consideration. As long as the rule of an existence in specie at the port of destination prevailed, the underwriter was not liable, if the voyage was broken up at the intermediate port, merely because the goods were not worth bringing on.¹ We have seen that this doctrine was attacked at various times by different judges, although not distinctly overruled till within a comparatively recent period. By the law as we suppose it to be now established by the English courts, it becomes the duty of the master to send on the goods only when they can be of value on arrival. But it is obvious that the master is not obliged to incur every expense, however great, to effect this object; and the question soon arose as to what was his duty in this respect. At first, the court laid down the rule cautiously, but not very definitely, and held, that, if the

¹ *Cocking v. Fraser, Park on Ins.* 151, *Marsh. on Ins.* 227. *Dyson v. Rowcroft*, 3 B. & P. 474, is sometimes referred to as contravening the doctrine of *Cocking v. Fraser*, but an examination of the facts of the case will show that the cases are entirely consistent. The ship put into an intermediate port so much damaged that repairs were necessary to enable her to proceed on her voyage. To make these repairs it was necessary to unlade the cargo. But the cargo was so much damaged that it was injurious to the health of the crew, and the government refused to allow it to be landed. It was therefore thrown overboard. This was held to be a total loss. So, in *Cologan v. London Ass. Co.*, 5 M. & S. 447, where the vessel was captured, and recaptured and sent into Bermuda, but was not allowed to proceed to her port of destination, and the cargo was therefore sold, it was held to be a total loss.

In *Anderson v. Royal Exch. Ass. Co.*, 7 East, 38, the vessel was under water for more than a month. The cargo was then recovered, and kiln-dried, but not sent on, although it might have been. The court held, that, if the abandonment had been made while the goods were under water, there would have been a total loss, but otherwise not. In *Parry v. Aberdeen*, 9 B. & C. 411, the goods were so much damaged at the intermediate port, that they would have been worthless on arrival, and no ship could be obtained to take the goods on. This was held to be a total loss. See also *Gernon v. Royal Exch. Ass. Co.*, 6 Taunt. 383. In *Thompson v. Royal Exch. Ass. Co.*, 16 East, 214; and in *Hedburg v. Pearson*, 7 Taunt. 154, it did not appear but that the cargoes might have been taken on. The underwriters were held not to be liable.

goods could be sent on in a reasonable time and at a reasonable expense, the master was bound to do it.¹ The inconvenience of having a rule dependent upon what the jury might in each case find to be a reasonable time and a reasonable expense being very great, the courts established a rule which is practical, and can be applied to the generality of cases with the same result. It is this: All the expenses at the intermediate port are to be added to the extra freight, if the transit cannot be effected at the original rate of freight; and if this exceeds the value of the goods on arrival, the loss is total; if not, it is partial only.²

And as to the intermediate port

¹ *Navone v. Haddon*, 9 C. B. 30. The vessel in this case put into an intermediate port in distress. Part of the cargo, which consisted of bales of waste silk, was sold on account of damage the rest arrived at the port of destination. The court seem to have acted on the supposition that if some of the bales were totally destroyed, the insured might recover for them (a question we have already considered), and it became important therefore to consider the condition of the bales which were sold. And, being of the opinion that a reasonable expense would have enabled the master within a reasonable time to dry the goods and forward them, the court held that the loss was not total.

² In *Reimer v. Ringrose*, 6 Exch. 263, 4 Eng. L. & Eq. 388, the cargo, consisting of corn, was taken out at an intermediate port, in order that the ship might be repaired, and, being found to be much damaged, was sold. The jury found that the corn might, by the exercise of reasonable and proper care, have been brought home and sold as damaged corn. And the court held, that, as the expenses of bringing it home did not exceed the value when brought home, the loss was not total. In the subsequent case of *Rosetto v. Gurney*, 11 C. B. 176, 7 Eng. L. & Eq. 461, the vessel

sailed from Odessa with a cargo of wheat on board, bound for Liverpool. She was stranded near Odessa, and to obtain funds for repairs a bottomry bond was given. When the vessel arrived near the Cove of Cork, it became necessary to run her ashore. She was afterwards towed into the Cove of Cork, and salvage claimed. The vessel and part of the cargo were sold by order of the Admiralty Court, and the proceeds divided between the salvors and the holders of the bottomry bond. The jury found that the cargo was much damaged, but might have been dried and carried on, at a reasonable expense, and also that it would not have been prudent for an uninsured owner to enter into a controversy with the salvors and the holder of the bottomry bond in the Court of Admiralty. By direction of the court, the jury found for the plaintiff. On a motion for a new trial, the court said: "The question to be submitted to the jury will be, Was it 'practicable' to send the whole or any part of the cargo to its place of destination, Liverpool, in a marketable state? To determine this question, the jury must ascertain the cost of unshipping the cargo, the cost of transshipping it into a new bottom, the cost of drying and warehousing it, and the cost of the difference of the

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The rule in this country on this subject was early established, at the time when the case of *Cocking v. Fraser*¹ was recognized as an authority in England. It is, therefore, well settled that, if the goods insured arrive at the port of destination existing in specie, the underwriters are not liable, although they are of no value whatever.² Some question has arisen as to the meaning of the word "specie." The primitive meaning of the word is, undoubtedly, *appearance*, and it is in this sense that it is commonly applied transit if it can only be effected at a higher sum than the original rate of freight. Add to these items the salvage allowed in proportion to the value of the cargo saved, and the loss will be total, if the aggregate exceed the value of the cargo when delivered at Liverpool, the port of discharge; but if the aggregate do not so exceed the value of the cargo, or of that part of it saved, the loss will be partial only."

¹ Park. Ins. 151, Marsh. Ins. 227.

² In *Morean v. United States Ins. Co.*, 1 Wheat. 219, 3 Wash. C. C. 256, memorandum articles were insured on a voyage from Cape Henry to Lisbon. The vessel was wrecked within the port of Lisbon, and part of the cargo was carried to that city and there sold. Mr. Justice Washington said: "If the property arrive at the port of discharge, reduced in quantity or value to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. . . . The only question that can possibly arise, in relation to memorandum articles, is, whether the loss was total or not; and this can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches its original port of destination." See also *Brooke v. La. State Ins. Co.*, 16 Mart. La. 640, 681, 17 Ib. 530; *Skinner*

v. Western Marine & F. Ins. Co., 19 La. 273.

In *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 220, 224, Mr. Justice Story said: "If the schooner had arrived at the port of destination, with the cargo on board, physically in existence, the plaintiff would not have been entitled to recover, however great the damage might have been by a peril insured against, even if it had been ninety-nine per cent, or in truth even if the cargo had there been of no real value." Nor does this doctrine conflict with the case of *Williams v. Cole*, 16 Maine, 207, as has been sometimes supposed. This was a case of insurance upon a cargo of potatoes from Frankfort to Baltimore. The policy contained a clause that certain articles, together with such as are esteemed perishable in their own nature, were warranted free from average, unless it amounted to seven per cent. On the arrival of the vessel at Baltimore, the hatches were opened and the potatoes were found to be entirely rotten. The mayor of the city ordered the cargo to be carried below the fort, and to be thrown overboard. This was held to be a total loss, on the ground that the cargo existed merely as a nuisance; but it must also be remembered that under the policy the underwriters were answerable for a loss equal to seven per cent.

to memorandum articles. Thus, if the body of a chariot is lost, and nothing but the wheels remain, these cannot be said to have the appearance of a chariot, and consequently the article no longer exists in specie, and the underwriters are liable as for a total loss with salvage.¹ But it has been held, that the value of the article has nothing to do with its existence in specie. Thus, fish, though absolutely putrid,² and corn which was spoiled,³ were both held to exist in specie. And pork has been held not to lose its identity by being roasted.⁴

Of the American Doctrine of Loss at an Intermediate Port.

By far the most difficult questions on this subject have arisen in determining what is a total loss at an intermediate port. We shall here consider the law only as determined by the American authorities generally, for if the fifty-per-cent rule applies to any kind of memorandum articles, as has been held in Massachusetts,⁵ they will be governed by the same rules as are applicable to other goods, and need not be considered here.

In New York, the dictum of Lord Mansfield, in *Cocking v. Fraser*,⁶ has been followed to its fullest extent, and the rule in that State is, that, if the goods exist in specie at the intermediate port, the insured is not entitled to recover. It is true that in some of the cases in that State there were facts which clearly showed that the loss was not total, and that the goods could

¹ *Judah v. Randal*, 2 Caines, Ca. 324.

² *Cocking v. Fraser*, Park, Ins. 151, Marsh. Ins. 227.

³ *Neilson v. Columbian Ins. Co.*, 3 Caines, 108.

⁴ *Skinner v. Western Marine & F. Ins. Co.*, 19 La. 273. The action was on a valued policy on pork in bulk, beans, and flour, valued at \$3,480. The risk was to continue until the flat-boat in which the cargo was shipped was landed safely in the port of New Orleans. On the way, the boat took fire about nine miles above the city, and

was burned to the water's edge. The bottom, however, floated down to New Orleans with some of the pork on board in a damaged, barbecued condition. The quantity thus saved was 7,723 pounds. It was represented by the port-wardens as damaged more or less by fire, and unmerchantable, and it was sold at the rate of 2½ cents per pound. This was held not to be a total loss, on the ground that roasted pork was still pork.

⁵ *Kettell v. Alliance Ins. Co.*, 10 Gray, 144, cited *post*, p. 111, n. 4.

⁶ Park, Ins. 151; Marsh. Ins. 227.

have been carried on, so as to arrive in specie; but these cases were decided on the ground that the goods existed in specie; and there are also other cases which are not only inconsistent with the English rule, but also with that laid down in many American cases.¹

But the doctrine, that if the goods exist in specie at the intermediate port there is no total loss, is not founded on principle; for the insurers guarantee that the goods shall arrive at the port of final destination in specie, and if, therefore, owing to the perils insured against, they cannot be carried forward so as to arrive in specie, the underwriters should be liable, notwithstanding the goods exist in specie at the intermediate port.² (And if the goods

¹ Thus, in *Maggrath v. Church*, 1 Caines, 196, the cargo, consisting of corn, was found at an intermediate port to be entirely unmerchantable, and unfit to be reshipped, yet the loss was held not to be total. In *Depeyster v. Sun Mutual Ins. Co.*, 17 Barb. 306, the vessel put into an intermediate port, with a cargo of hides in a putrefying condition. It being thought impossible to carry the hides to the port of destination, they were sold; and it was held, that, as they existed in specie, the loss was not total. See also *Neilson v. Col. Ins. Co.*, 3 Caines, 108; *Saltus v. Ocean Ins. Co.*, 14 Johns. 138. The case of *Depeyster v. Sun Mut. Ins. Co.*, came before the Court of Appeals, and from the report there it appears that at the time the judge ruled, that while the hides existed in specie and capable of transportation to the port of destination, there could be no recovery for a total loss, unless the skins and hides were, in consequence of a peril insured against, in such a condition as to endanger the lives of the crew of any vessel that should undertake to carry them on, and that, had an attempt been made to bring them to the port of destination in any vessel, such vessel would,

before her arrival, have either been left without hands to navigate her, or in such a state as to render the throwing overboard of the hides on the voyage indispensably necessary to save the vessel and crew. 19 N. Y. 272. In *Bryant v. New York Ins. Co.*, 25 Wend. 617, 1,970 barrels of corn were insured on a voyage from Windsor, N. C., to New York. The vessel was wrecked on Beacon Island Shoals. The chance of recovering the corn was sold to different persons in lots, at a trifling sum per barrel. The risk and expense were so great, that some preferred to lose the money they had already spent, rather than to endeavor to recover any of the corn. Only twenty-seven barrels were saved. This was held to be a total loss, and Mr. Justice Nelson said: "It was in fact total, — as much so as if the cargo had gone to the bottom of the sea; upon every reasonable calculation, the amount saved was by mere accident and chance."

² It was held, in *Aranzamendi v. Louisiana Ins. Co.*, 2 La. 432, that, if a damaged cargo is sold at an intermediate port, this is not a total loss, unless the goods were in such a condition that they could not have been carried on. What

are in such a condition at the intermediate port that they cannot

may, perhaps, be considered the true doctrine, was laid down in *Williams v. Kennebec Mutual Ins. Co.*, 31 Maine, 456. It was held, that if the article was in such a condition at the intermediate port, that, by the exercise of reasonable diligence and care, it could be carried to the port of final destination, so as to reach there in specie, although it might be worthless, the loss would be but partial, but otherwise if it would not arrive in specie. In *Poole v. Protection Ins. Co.*, 14 Conn. 47, insurance was effected on 280 hides, from Mobile to New York. The vessel was wrecked near Nassau, and the hides were under water for more than a week. They were then recovered, taken to Nassau, and sold by the salvors. They were never in the possession of the assured or their agents. The court held that the loss was total. The case was probably correctly decided on all its facts, but there are many *dicta* in it, which do not seem to us to be correct.

In *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 220, the vessel was wrecked at an intermediate port; the cargo consisted of potatoes, which were nearly all rotten, or so much injured as to be of little value. There was but one vessel in port, capable of taking on the cargo, and that vessel had a cargo on board, and was bound on another voyage. *Story, J.*, held that it was an insurance on the cargo for the voyage; and if, by reason of the perils insured against, the cargo was permanently prevented from arriving at the port of destination, that constituted a total loss, for which the insured was entitled to recover upon a policy like the present. And it was held, that, in determining whether there was a loss at the intermediate port, the jury should find: "1.

Whether the vessel could have been repaired at all, or at a cost not exceeding half her value after the repairs were made, in a reasonable time to carry on the cargo to the port of destination. 2. Whether, if she could be repaired for less than the half-value, she could have been repaired before the cargo would have been so deteriorated as to have lost all value, or to have been totally destroyed. 3. Whether, if the vessel were not so repairable, another vessel could have been procured to carry on the cargo to the port of destination, in its then damaged state."

The case of *Hugg v. Augusta Ins. & Banking Co.*, 7 How. 595, is an important one on this subject. The insurance was on the freight of the vessel at and from Baltimore to Rio Janeiro, and back to Havana and Matanzas. The policy contained the usual memorandum clause. About four hundred tons of jerked beef were shipped to be delivered at Matanzas. The vessel was obliged to put into Nassau, where the cargo was found to be so much damaged, that the Board of Health refused to allow but about one hundred and fifty tons to be landed. This portion was wet and heated, and not in a fit condition to be shipped. The vessel could not have been repaired, except at an expense exceeding half her value, so as to have carried the cargo to the port of destination, and there was no vessel in port which could have been procured to take it on. This fact is so declared in the statement of the case on page 596; but Mr. Justice *Nelson*, in delivering the opinion of the court, says, on page 605, that the point certified to the court assumes that the ship was capable of carrying on the cargo, and that the only question was, whether the

Main is settled { be carried forward consistently with the health of the crew and the safety of the vessel, the loss is considered as total.¹

Amended { From the examination of the authorities which we have made in our notes, it is apparent that no case in this country distinctly decides the question, whether, in case the goods are in such a condition at the intermediate port, that the cost of unloading them, and drying them if necessary, together with the increased freight for sending them on, would exceed the value on arrival, the loss is total. The expenses may be separated into two classes.

Unsettled { First, those incident to the delay at the intermediate port, such as the unloading and reloading of the goods, and all the expenses incurred to render them fit for reshipment.

Second, the increased freight, if any.

And, admitting that all these are properly chargeable to the underwriters on the memorandum articles, the question still remains, whether the insured is entitled to abandon the goods and recover for a total loss, if the goods would arrive in specie, though of no value, if these expenses should be incurred.

cargo was so much damaged as to have dispensed with that duty. It was held, that if the repairing of the vessel or the procurement of another would necessarily have produced such a retardation of the voyage as would in all probability have occasioned a destruction of the article in specie before it could have arrived at the port of destination, or if, from its damaged condition, it could not have been reshipped in time consistently with the health of the crew or safety of the vessel, or if it would not have been in a fit condition from pestilential effluvia, or otherwise, to have been carried on, it then was the duty of the master to sell the goods for the benefit of whom it might concern. It was also held, that unless another vessel could have been procured at an expense not exceeding the amount of the freight to

be earned by completing the voyage, the underwriter on freight would have had no right to insist upon this duty of the master.

In *Tudor v. New England Mutual Ins. Co.*, 12 Cush. 554, insurance was effected on a cargo of ice, a memorandum article. The vessel put into an intermediate port, and it was found that it would be necessary to unpack the ice, in order to repair the vessel, and that it was so much melted, that the whole of it would be gone before the vessel could be repaired, so that it could be reshipped. Held, that there was a total loss of the ice.

¹ *Hugg v. Augusta Ins. & Banking Co.*, 7 How. 595; *William v. Kennebec Mutual Ins. Co.*, 31 Maine, 455; *Poole v. Protection Ins. Co.*, 14 Conn. 47.

CHAPTER IV.

OF CONSTRUCTIVE TOTAL LOSS AND ABANDONMENT.

SECTION I. — *Of the Distinction between Actual and Constructive Total Loss.*

IN practice, much the larger part of the losses which are total become so by abandonment; or, at least, require an abandonment, that they may have the legal effect of a total loss.¹ But the distinction between an *actual* total loss and a *constructive* total loss, defining the latter to be that which is made so by abandonment, is not perfectly precise nor always applicable. In a strict sense, the property is not wholly destroyed, either by fire or submersion, and still less is it by capture. But it is wholly lost to the owner as the thing which it was formerly. The ship may be burnt to the water's edge, and the ruined hull still float; or it may have gone down where no human power can either find or recover it; or it may be captured, condemned, and sold, and

¹ Emerigon states that the present positive rules respecting abandonment grew out of the express stipulations which it was the custom of the parties to make. Emerigon, ch. xvii. § 1 (Meredith's ed.), 666. However this may be, it is certain that provisions were very early made for abandonment in foreign codes regulating assurance. Guidon de la Mer; Reg. d'Amsterdam, art. 25; Casaregis, Disc. 3, n. 6. Although it appears in the statute of 43d Elizabeth (1601), establishing a commission to decide questions arising among merchants upon policies of insurance, that marine insurances had then been common time out of mind, the subject of abandonment does not appear to have assumed importance in the courts until the time of Lord Mansfield. The first reported case on this subject appears to be that of *Pringle v. Hartley*, 3 Atk. 195, before Lord Chancellor Hardwicke. Molloy, in his short but lucid treatise upon insurance, scarcely alludes to the subject. Molloy, de Jure Maratimo, Book 2, ch. 7, § xv. Weskett on Insurance, published 1783, contains only two cases upon it. At present there is, perhaps, no topic of insurance more important or more difficult, or which has been discussed by a larger number of more learned adjudications. See a very learned discussion of the subject of abandonment by Lord Abinger, C. B., in *Roux v. Salvador*, 3 Bing. N. C. 266.

so gone irretrievably. Under any such circumstances it is as totally lost to the owner as if it were annihilated, and we have seen that such losses are, as they should be, called total.

So, where a vessel is abandoned by her officers and crew on the ocean, the question in every such case is, Was it impossible to bring the vessel into port? or, in other words, Was the act of desertion justified? for, if not, there is no actual total loss under the policy; and the burden of proof would of course be on the owner to prove this fact. But, if it be proved, the loss is not the less total because the master and crew might have remained on the wreck, or because it continued to float, if it be clear that it could not have been brought into port.¹ But if the burnt hull arrives at the port of destination, or the vessel sinks where, by a certain expense, she can be recovered, or is captured under such circumstances that a substantial hope exists of getting her again by ransom, decree of court, or otherwise, the loss is neither total in a strict sense nor in any just sense; because, although the owner is dispossessed of his property in its original condition, there remains in his hands a valuable remnant, or a valuable hope and possibility of recovering the property. It is plain, therefore, that if he claims from his insurers as for a total loss, the principle of indemnity requires that he should in some way account or allow for the value remaining with him. Formerly, the way of doing this was by calling the loss, not total, but partial, and claiming exact indemnity. But practice and long experience proved to merchants that the better way was to consider the loss total, and make it so in fact by transferring to the insurers all the remaining or resulting value in the hands of the insured. Then, the insurers paid the whole sum they were bound to pay in case of actual total loss, and indemnified themselves as far as possible from the value thus transferred to them.²

This is now the usual practice. Such a loss is commonly called

¹ Walker v. Protection Ins. Co., 29 Maine, 317.

² There seems to be a difference of opinion as to the expediency of extending the right of abandonment. In Mitchell v. Edie, 1 T. R. 608, 615, *Bul-ler, J.*, said: "Whether many years

ago it might not have been wiser for the courts to have determined that the owners should not in any case abandon where the property did exist, is not for our consideration. About the year 1745, that question was determined after much deliberation." Lord Mansfield

a constructive total loss, as distinguished from an absolute or actual total loss. And the latter term applies, although some of the property has been sold and the proceeds are in the hands of the insured, if there is no need of an abandonment. The insurer is entitled to the property thus saved, and it is usually called salvage.¹ This word has been defined to mean "a part or remnant of the subject insured, which survives a total loss." The insurers are not therefore entitled to property, as salvage, which was

in *Goss v. Withers*, 2 Burr. 683, 697, states that "in late times the privilege of abandoning has been restrained for fear of letting in frauds." And *Putnam, J.*, in *Deblois v. Ocean Ins. Co.*, 16 Pick. 303, says: "We are among those who think that this part of the law of insurance, as it now is administered, is a clear departure from the great principle of indemnity upon which the contract of insurance should rest. According to the original intent, surely the underwriters were to pay the damage, the actual loss. They were not to become ship-owners, brokers, or merchants. We must decide the law as we now find it. But where a construction is to be made, in the absence of binding authority, we prefer that which restrains, rather than that which enlarges, the right to make a total loss." See also the remarks of Lord *Ellenborough*, C. J., in *Bainbridge v. Neilson*, 10 East, 329, 343. On the other hand, Mr. Justice *Story*, in *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, 38, remarks: "It has been said that abandonments are not to be favored; that they have been liable to great abuses, and that courts of law are not disposed to enlarge the practice. I am very much inclined to believe, that of late years this consideration has had quite as much weight as it deserved." The Supreme Court of Massachusetts, moreover, in two recent cases, to be

fully considered in a subsequent note, have carried the doctrine of abandonment very far. See *Heebner v. Eagle Ins. Co.*, 10 Gray, 131; *Kettell v. Alliance Ins. Co.*, 10 Gray, 144.

¹ Whatever may have been the original or etymological meaning of the words, we must admit, that, in practice, those only are called *constructive total losses* which are consequent upon an abandonment. See *Arnould* on Ins. 990, 997. In *Roux v. Salvador*, 3 Bing. N. C. 266, the property saved was sold for nearly one fourth of the amount at which it was valued in the policy; yet Lord *Abinger*, C. B., in delivering the opinion of the Exchequer Chamber, said: "It appears to us that this was not the case of what has been called a *constructive* loss, but of an absolute total loss of the goods." So in *Hugg v. Augusta Ins. & Banking Co.*, 7 How. 595, 605, *Nelson, J.*, said: "In the case of memorandum articles, the exception of particular average excludes a constructive total loss; and, of course, the principle which allows an abandonment where the loss exceeds half the value does not apply. There must be an actual loss." But it has never been denied that there might be salvage of memorandum articles, and yet a recovery for a total loss. See also *Murray v. Hatch*, 6 Mass. 465; *Tudor v. New England Ins. Co.*, 12 Cush. 54.

severed from the voyage by their consent before the loss took place.¹

If a vessel is sold by the insured or his agent, he is bound to account to the insurers for the amount received; and, if the insurer is not satisfied that the amount is correctly stated, he can have the accounts sent to an auditor; but if he goes to trial, it is incumbent on him to show that more salvage was received than is accounted for.² The phrase "technical total loss" means much the same thing as constructive total loss.

The insured may always withhold an abandonment if he chooses to do so; nor does this discharge or bar his claim against the insurers; it affects only the manner of the adjustment. If the loss be actually total, as there is nothing to abandon, an abandonment can have no effect whatever. If the loss be such that an abandonment is necessary to make it total, then the insured may claim and adjust it as a partial loss if he wishes to do so;³ or he may abandon and claim for a total loss. As he never needs to abandon, unless he chooses to do it, so he may make an abandonment whenever he pleases; but if he makes one when the insurers are not bound to

¹ *Mutual Marine Ins. Co. v. Munro*, 7 Gray, 246. The vessel on a whaling voyage had liberty to sell her catchings, or to ship them home, at the risk of the insured. The insurance was on the outfits of the vessel, and the policy contained the clause: "It is understood and agreed, that one fourth of the catchings shall replace the outfits consumed; except that catchings shipped home from the Cape de Verd Islands, or this side thereof, shall be at the risk of the insured, without diminution of the value of outfits at the time." A part of the catchings, being of less value than three fourths, were sent home, and arrived in safety; and the ship being afterwards lost, it was claimed that one fourth part of the quantity sent home was in the nature of salvage realized by the assured, and a proper portion thereof should be deducted from the amount of the loss on outfits, for which the plaintiffs were lia-

ble. But the court, for the reasons given in the text, held that it was not properly salvage.

² *Lewis v. Eagle Ins. Co.*, 10 Gray, 508.

³ *Smith v. Manufacturers' Ins. Co.*, 7 Met. 448, 451; *Hamilton v. Mendes*, 2 Burr. 1198, 1211; *Allwood v. Henckell, Park, Ins.* 239; *Gracie v. New York Ins. Co.*, 8 Johns. 237, 244; *Earl v. Shaw*, 1 Johns. Ca. 313, 317; *Roget v. Thurston*, 2 Johns. Ca. 248. In *Watson v. Ins. Co. of N. A.*, 1 Binn. 47, it was held, that, where a total loss was proved to have taken place, but no abandonment made, the jury might estimate the value of the *spes recuperandi*, deduct it from the whole sum insured, and find the remainder as a partial loss. But *Kent*, C. J., in *Gracie v. New York Ins. Co.*, *supra*, said he could not assent to this doctrine. See also *Calbreath v. Gracy*, 1 Wash. C. C. 219.

accept it, and they do not accept it,¹ the abandonment has no effect whatever; but the insurers may accept any abandonment made to them, and, if they choose to accept an abandonment which they are not bound to accept, by such acceptance they make it valid; and they must then settle the loss as a constructive or technical total loss.²

SECTION II. — *Of an Abandonment.*

WE will first consider the effect of an abandonment, or of the want of one, upon the rights and obligations of all parties.

It should be remarked that the parties sometimes expressly agree and stipulate that there shall be no abandonment. This would seem to be intended to prevent a partial from becoming a constructive total loss, but not to change the nature of an actual total loss.³ So insurance may be made against total loss only, and the question then arises whether the assured may abandon and recover for a constructive total loss. In considering this very difficult question, we must remember that phrases used almost indiscriminately, as "against total loss only," "free from average," "free from particular average," "not liable for partial loss," and "partial loss excepted," whatever they may mean, do mean for many purposes the same thing whether the total loss intended by the policy is an actual or a constructive total loss. The cases in which one or another of these expressions comes under construction are so numerous, so various, and so conflicting, that we know not how better to deal with this subject than to present these authorities fully, which we do in our notes.⁴

¹ See *Delaware Ins. Co. v. Winter*, 38 Penn. St. 176. This is also an instructive case upon many of the questions which belong to constructive total loss and abandonment.

² See *post*, § 6.

³ In *Barney v. Maryland Ins. Co.*, 5 Harris & J. 139, the policy contained a stipulation, "not to abandon, in case of capture, until condemned." *Chase, C. J.*, was inclined to consider the clause a warranty, and that an offer to abandon,

after capture and before condemnation, avoided the policy. But *Buchanan, J.*, held, that an abandonment, under those circumstances, had no effect whatever, and the assured was in the same position that he would have been in, had no abandonment been made. This diversity of opinion did not affect the decision of the case, as the whole court were of opinion that there was no claim, for either a total or a partial loss.

⁴ One of the earliest cases where a

It will be seen that a rule which we have heretofore supposed to be the well-established rule in this country, namely, that the

ship was insured against total loss only is that of *Pole v. Fitzgerald*, Willes, 641, decided in 1752, where it was assumed that a party who insured a ship free from average might, by abandonment, recover for a constructive total loss. It was so assumed also in *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. 541, decided in 1844. In neither of these cases was the question discussed. In 1810, the matter came before the Supreme Court of Massachusetts, in the case of *Murray v. Hatch*, 6 Mass. 465. The ship, cargo, and freight were insured against "a total loss only." The vessel was valued at four thousand dollars. During the voyage, she was driven ashore on the island of Bermudas, and so damaged that it would have cost fifteen hundred dollars to repair her. She was sold to pay salvage expenses, and, after this was done, a balance of about four hundred dollars remained. At the trial, parol evidence was offered, that, at the time of subscribing the policy, it was agreed that the policy should be considered as against a total loss in the natural sense of the words only, so that if any part should be saved the underwriters should not be considered liable. This evidence was rejected; and the defendant then contended that the words used did not include a constructive total loss; but the judge ruled that the loss as proved was a loss within the policy. The case then came up on exceptions to these rulings, and was argued before *Sewall, J., Sedgwick, J., and Thatcher, J.* On page 477 of the report, *Sewall, J.*, said: "It is stated that the vessel was not worth repairing, and that it would have cost fifteen hundred dollars to repair her, which proves that the subject-matter of the insurance was not spe-

cifically destroyed, and that the voyage was not entirely and inevitably defeated. Whether the injury sustained, and the expenses of salvage, rendered the voyage of no value, and not worth pursuing, is not a question to be considered, where the policy is restricted to the case of a total loss. That case is only proved by showing the destruction of the thing specifically, and in that sense totally." The learned judge also, in another part of the decision, refers to the authorities on the common memorandum clause, which he considers as determining the construction of the phrase "total loss only." The verdict was set aside, and a new trial granted. It may be said, that, in this case, there was no constructive total loss; but the case was not argued on this supposition, and was decided solely on the ground that a total loss, in this connection, meant an actual, and not a constructive, total loss. The fact that the vessel might have been repaired, at an expense less than half her value, is referred to only to show that the vessel "was not specifically destroyed, or rendered irreparable." In a similar case in New York, *Buchanan v. Ocean Ins. Co.*, 6 Cow. 318, 331, the same construction was given to these words, and *Savage, C. J.*, after citing the above case of *Murray v. Hatch*, said: "Whether there was in this case a technical total loss; whether an abandonment was necessary; or, if so, whether it was made in due season, are questions not necessary to be discussed, upon the view which I have taken."

In November, 1855, this question came again before the Supreme Court of Massachusetts in the case of *Heebner v. Eagle Ins. Co.*, 10 Gray, 131. Insurance was effected on the steam propeller Chesa-

words "total loss" meant actual and not constructive total loss, and consequently that there could be no abandonment under the

peake for one year, against total loss only. The vessel was valued at forty thousand dollars. During the period of the risk she was damaged by perils of the sea, and put into port, where she was surveyed, and the repairs necessary to render her sea-worthy estimated at \$22,951. In compliance with the report of the surveyors, the vessel was sold at auction, and brought \$2,175. The case came before the court on an agreed statement of facts, by which, if the court should be of opinion that the defendant was liable for a constructive total loss, the case was to be sent to an assessor to determine whether such a loss had actually taken place. In November, 1857, the court held that the phrase "total loss" meant a constructive total loss, and that the defendant was liable if such a loss had taken place. See also *Greene v. Pacific Ins. Co.*, 9 Allen, 217.

Some policies, it may be remarked, contain a clause that the insurers shall not be liable for any partial loss under fifty per cent. *Commonwealth Ins. Co. v. Chase*, 20 Pick. 142.

As the loss of freight generally depends on the question whether there has been a loss of the cargo, we shall consider the two subjects together.

In one of the earliest cases on this topic, *Cocking v. Fraser*, Park, Ins. 151, Lord Mansfield defines a total loss to be the "absolute destruction" of the subject, thus clearly excluding a constructive total loss. Lord Ellenborough, in *Thompson v. Royal Exch. Ass. Co.*, 16 East, 214, said: "If this can be converted into a total loss by a notice of abandonment, the clause excepting underwriters from particular average may

as well be struck out of the policy." In *Skinner v. Western Mar. & F. Ins. Co.*, 19 La. 273, Bullard, J., said: "The doctrine in relation to memorandum articles is well settled at the present day; as it relates to them there is no constructive total loss. . . . The cargo in question, corn, being within the memorandum, which exempts the insurer unless the loss is total, that is, unless specifically destroyed or lost, the only question here is, whether, under these circumstances, the corn is to be regarded as falling within the rule." Per Nelson, J., in *Bryan v. New York Ins. Co.*, 25 Wend. 617: "The terms used in the policy, 'free from average unless general,' are understood to be convertible with total loss; and under such a warranty by the assured the law is perfectly well settled in the United States, that there must be either a total physical destruction of the object insured, or a total destruction of value." Per Porter, J., in *Aranzamendi v. Louisiana Ins. Co.*, 2 La. 432. The following cases also fully support the doctrine that the words "total loss," when applied to cargo or freight, mean actual and not constructive total loss. *Hugg v. Augusta Ins. Co.*, 7 How. 595; *Morean v. United States Ins. Co.*, 1 Wheat. 219; *Biays v. Chesapeake Ins. Co.*, 7 Cranch, 415; *Saltus v. Ocean Ins. Co.*, 14 Johns. 138, 145; *Humphreys v. Union Ins. Co.*, 3 Mason, 429; *Brooke v. Louisiana State Ins. Co.*, 16 Mart. La. 640; *Depeyster v. Sun Mut. Ins. Co.*, 17 Barb. 306; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 33, 38; *Williams v. Kennebec Mut. Ins. Co.*, 31 Maine, 455, 461; *Le Roy v. Gouverneur*, 1 Johns. Ca. 226; *Ogden v. General Mut. Ins. Co.*, 2 Duer, 204;

fifty-per-cent rule, has been departed from in Massachusetts, and it is there held, that, if the subject insured is not perishable in its

Willard v. Millers & Manuf. Ins. Co., 24 Mo. 561; *Navone v. Haddon*, 9 C. B. 30; *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 220.

We will now proceed to consider the authorities which are opposed to the view above taken, and which maintain that the assured may recover for a constructive total loss. The leading case on this point is the late one of *Kettell v. Alliance Ins. Co.*, 10 Gray, 144. The policy was an open one, with the following indorsement: "Feb. 1, 1854. \$ 4,850 on property on board ship *Charles Humberston*, from Liverpool to Boston." The policy contained the usual memorandum clause, together with the following article in the margin, near the close of the policy: "Partial loss on sheet-iron, iron wire, braziers' rods, iron hoops, and tin plates is excepted." It appeared by the facts agreed that the "property" embraced in the indorsement consisted of five hundred boxes of tin plates, invoiced and valued together. The ship sailed, and was wrecked on the coast of Ireland, and the cargo in a damaged condition was carried back to England, and sold for account of whom it might concern. The net proceeds of the tin plates, after deducting the necessary costs and expenses of sending them back to Liverpool, and the costs of the sale, were less than half the value of the shipment. Held, that the insurers were liable. This decision proceeds on the ground that there is a distinction between the meaning of the words "partial loss excepted," when applied to articles perishable in their nature, and their meaning when applied to tin plates. Thus, *Shaw, C. J.*, said: "One reason given

why a constructive total loss should not be made up of damage on memorandum articles, so as to allow of an abandonment for damage, was that, in case of mere damage, it is so difficult to distinguish between that part of the visible damage which proceeds from internal tendency to decay, and that part which proceeds from perils of the sea, that it must have been the intention of the contracting parties to exclude it altogether. In this respect there is a marked difference between tin and brass goods liable to tarnish and memorandum articles liable to decay." The effect of this decision, then, as we understand it, is this,—that the meaning of the words "against total loss only" depends entirely upon the nature of the article insured,—that when applied to articles perishable in their nature they mean actual total loss, and when applied to other articles, constructive total loss. The case of *Heebner v. Eagle Ins. Co.* may be considered as leading to the same conclusion. But the insurers on an old ship are unwilling to sustain the risks arising from her weakness and decay, because such injuries mingle themselves so inextricably with, and so much increase, those which arise from sea-perils, that the insurers prefer not to insure against any but sea-perils, and for this purpose insert the exception, which excludes all but total loss. This is generally, at least, the reason for this exception in relation to a ship, and it is the same reason which has induced the same exception as to memorandum articles; nor is it satisfied in either case unless the total loss insured against is held to be actual total loss only. It is a serious objection to the construction put

nature, the assured may abandon if the damage exceeds fifty per cent of the valuation. We are, however, inclined to the opinion,

upon these words by the learned court of Massachusetts, that the right of the assured, under the construction given to these words, does not depend upon the quantum of injury done, but upon the election of the assured to abandon. For he cannot, although the damage amount to ninety-nine per cent, recover anything if a valid abandonment is not made. His right to recover, then, depends upon his own act, and not on the occurrence of any peril insured against. In other words, the abandonment operates as if it were the proximate cause of the loss. This objection is one of the principal causes of the construction put upon the words "partial loss excepted," in the common memorandum. Mr. Justice *Washington*, in *Morean v. United States Ins. Co.*, 1 Wheat. 219, states the law as follows: "There is no instance, where the insured can demand as for a total loss, that he might not have declined an abandonment, and demanded a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurers for a partial loss, and consequently he cannot elect to turn it into a total loss."

The object of the memorandum clause originally was undoubtedly to protect the underwriter from any partial loss on articles perishable in their nature, which are liable to inherent decay and damage, independently of the damage occasioned by the perils insured against, and where it would be difficult to distinguish between them. See *Hugg v. Augusta Ins. & Banking Co.*, 7 How. 595. It is, however, a familiar rule, that the purpose for which a clause was introduced, although it may afford some

aid in arriving at its meaning, cannot control the construction of its language. *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297, per *Bartol, J.* But if the reason of the origin of the memorandum clause should be resorted to, to determine the liability of the underwriters under it, it would follow that, where a portion of the article insured was clearly proved to have perished by a peril of the sea, the underwriters would be liable for such loss, the memorandum being treated as of no effect. Such is the natural consequence of the reasoning in the above cases of *Heebner v. Eagle Ins. Co.*, and *Kettell v. Alliance Ins. Co.*; but courts of high authority have declared that the parties are bound by their contract, that the words "total loss" have acquired a fixed and determinate meaning, and that the origin of the clause cannot be looked at to determine the liability of the insurers. Thus, in *Biays v. Chesapeake Ins. Co.*, 7 Cranch, 415, where a part of a cargo of hides was lost by a lighter sinking, it was contended that the rule did not apply. Mr. Justice *Livingston* said: "Whatever may have been the motive to the introduction of this clause into policies of insurance, — which was done as early as the year 1749, and most probably with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality, — or whatever ambiguity may once have existed from the term 'average' being used in different senses, that is, as signifying a contribution to a general loss, and also a particular or partial injury, falling on the subject insured, it is well understood at the present day, with respect to such arti-

that the rule which would not sanction an action under a policy restricted to a total loss by any of the many phrases which are

cles, that underwriters are free from all partial losses of every kind which do not arise from a contribution towards a general average." In a similar case in New York, the language of the court is even stronger. *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 33, 38, per *Walworth*, Ch.: "The object of introducing the memorandum into the policy was to protect the underwriters against injuries arising to particular articles from inherent decay. But it does not follow that the excepted risk is to be confined to those injuries only. If the insurer, for the purpose of guarding against natural decay, has made the exception broad enough to include other losses, he is entitled to exemption from every risk which is plainly and explicitly included within the terms of the exception. If the terms 'free from average unless general,' as used in the memorandum, had by a long course of commercial usage acquired a precise and definite meaning among commercial men, it would be the duty of the court to consider them as used in that sense in a recent policy. But there is no evidence that the term 'average,' as here used, has ever been understood as meaning a partial loss arising from deterioration in the quality or value of the articles exclusively. . . . I believe in the United States the terms 'partial loss' and 'average' are understood by commercial men to mean the same thing; and that average other than general includes every loss for which the underwriter is liable, except general average and total loss, which last includes total loss with salvage. . . . In relation to the law of insurance, it is not only important that it should be fixed and certain, but it is

equally desirable that the principles adopted should be the same in all the courts of this country; and where the law has been deliberately settled in the Supreme Court of the United States, or in the Superior Court of any particular State, the rule thus adopted should not be departed from by any other court on slight grounds."

So, in *Brooke v. Louisiana State Ins. Co.*, 16 Mart. La. 640, 644, where mules were insured against stranding or a total loss, the court held, that, although mules were not generally considered memorandum articles, still the parties had a right to enumerate them in that clause; and, this being done, the words "total loss" were to receive the same construction as would be applicable to memorandum articles generally. And in *Waln v. Thompson*, 9 S. & R. 115, where insurance was effected on "profits" on a cargo of goods warranted free from average, the court held that a loss of over fifty per cent was not a total loss, although the goods were china, tea, and cassia, articles not perishable in their nature. The distinction between perishable articles and others was strenuously urged by counsel, but the court held that the same rule applied to both.

There is also one other objection to the decision of the court, in the above case of *Kettell v. Alliance Ins. Co.* The court assumed the fact, that tin plates are not to be classed with articles perishable in their own nature. Although tin plates are not articles perishable in their nature, if by that is meant easily liable to entire destruction, yet their value is very perishable; and, from their liability to rust, they are

used for that purpose, unless the loss be total without abandonment, rests on the weight of authority, and on the stronger reason.

generally considered by underwriters as more dangerous articles to insure than many articles called perishable, and are insured at a higher premium. In New York, bar and sheet iron, iron wire, *tin plates*, salt, grain of all kinds, tobacco, Indian meal, fruits (preserved or otherwise), cheese, dry fish, vegetables, and roots, hempen yarn, cotton bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles perishable in their nature, are classed together, and insured free from average unless general, while sugar is insured free from average under seven per cent. *Vaucher, Guide to Mar. Ins.* 131. In New Orleans, the classification is much the same, while sugar is insured free from average under five per cent. *Vaucher, Guide to Mar. Ins.* 126. In the elaborate enumeration of memorandum articles, by Mr. Phillips, 1 Phillips, *Ins.* § 54, note, it appears that tin plates are insured free from average in New York, Philadelphia, Baltimore, and Charleston. By the Charleston Comm. *Ins. Co.* they are insured free from average, if damaged by wet or rust. In Cincinnati, they are free under twenty per cent. In a note to *Lord v. Neptune Ins. Co.*, 10 Gray, 117, the memorandum clause in *Hugg v. Augusta Ins. & Banking Co.*, 7 How. 595, is given at length. From this it appears that tin plates are classed with salt, grain, tobacco, Indian meal, fruits, cheese, dry fish, vegetables, and roots, hempen yarn, and cotton bagging, "and all other articles that are perishable in their own nature"; while hemp is free from average under twenty per cent, and sugar, flax-seed, and

bread are free from average under seven per cent, and coffee in bags or bulk, and pepper in bags or bulk, are free from average under ten per cent.

The usual memorandum clause in the policy now under consideration exempted the underwriters from all partial loss on salt, grain, fish, fruit, hides, skins, or other goods perishable in their nature, unless the loss should happen by stranding, in which case they were not to be liable for loss under seven per cent. On sugar, flax-seed, bread, tobacco, and rice, they were to be liable for all loss over seven per cent of the aggregate value. Then, near the end of the policy, was the clause, "partial loss on sheet-iron, iron wire, braziers' rods, iron hoops, and tin plates, is excepted." From the fact that the words "unless the vessel be stranded," were omitted, we think it clear that the underwriters regarded these articles as the most liable to damage of all enumerated in the policy. But the court deduced a different result from the same facts. After mentioning that the underwriters would have been liable if the goods had been in the common memorandum, as the loss happened by stranding, *Shaw, C. J.*, said: "What, then, is the extent of this exception? The natural construction is, that it leaves the insurer liable for all total losses, but it makes no distinction between absolute and constructive total losses, and in case of a constructive total loss, which gives the assured a right to abandon, and he exercises the right, it becomes a legal total loss, as if absolute in its nature." We are, however, constrained to say that this does not, in our judgment, seem to be the most natural construction, and

In this country, the ship, cargo, and freight are seldom jointly insured in the same policy. If they are, it would seem that an abandonment cannot be made of either of these interests separately.¹ If one sum is insured by the policy upon a cargo consisting of various kinds of merchandise, it would seem to be clear that there can be no abandonment of a part, and not of the whole. If insurance is made, therefore, against the total loss by actual destruction of the whole only, and some portion of one of the kinds of merchandise on board is saved, there is no valid claim whatever against the insurers.² But if the several parts or kinds of merchandise are severally and distinctly valued, it has been held, that this divides the loss so entirely, that there may be an abandonment of one of these parts, and not of the rest.³

A similar question arises, when a cargo consisting of bales, packages, etc. of the same kind of goods is insured against total loss only, or free from average under a certain per cent. But this subject we have already considered, and refer to what we then said.⁴

It is obvious, from the nature and purpose of abandonment, that accordingly, after a careful review of the authorities, we consider the law to be, that the effect of the words "partial loss excepted," or "against total loss only," is to exempt the underwriter from all loss but an actual total loss. But in Massachusetts the tendency of the late decisions seems to establish the rule, that the assured may abandon if the article be not perishable in its nature; although the court once declared itself in favor of restraining the right of abandonment to those cases where it was compelled to recognize it by settled law. *Deblois v. Ocean Ins. Co.*, 16 Pick. 303.

¹ In *Stocker v. Harris*, 3 Mass. 409, the position was taken by counsel, that in such a case the interest in the ship could not be alone abandoned, but the point was not decided by the court. See 2 Marsh. Ins. 601.

² *Guerlain v. Col. Ins. Co.*, 7 Johns.

527. See also *Humphreys v. Union Ins. Co.*, 3 Mason, 429; *Morean v. United States Ins. Co.*, 1 Wheat. 219; *Wain v. Thompson*, 9 S. & R. 115. But in England it has been held in a recent case, that where insurance was effected on goods described as "master's effects," those lost might be recovered, although not separately valued. *Duff v. Mackenzie*, 30 Law Times, 103, 20 Law Reporter, 701.

³ *Deidericks v. Commercial Ins. Co.*, 10 Johns. 234. So, if different parts of a cargo, belonging to one person, are insured by the same underwriters by different policies, it seems that an abandonment may be made upon one policy. *Valin*, tome 2, p. 109. And if a certain sum is insured on each article, this is the same as if it was separately valued. *Emerigon*, c. 17, § 8; *Pothier*, Ins. n. 132.

⁴ See *ante*, Vol. I. pp. 637, 638.

no person can abandon who has not the power of making a legal transfer of the interest or property which he abandons. If, therefore, the property passes from him by his own voluntary act or by a peril not insured against, before the underwriters can take possession of the vessel, the loss is to be considered as partial only.¹ But, if the sale of the vessel is rendered necessary by a peril insured against, the insured may still abandon and claim a total loss, if the sale was caused in no way by his default.² And if after an abandonment, but before the underwriters can take possession, the master sells the vessel, this act will be considered as done by him as agent of the underwriters; and if the facts, at the time of the abandonment, showed the loss to be total, the sale will not in any way affect the rights of the assured.³

¹ In *Higginson v. Dall*, 13 Mass. 96, the ship was insured by a valued policy to the full amount of her valuation in Calcutta, and also by an anterior open policy by the defendant. The vessel had been abandoned on the Calcutta policy to the underwriters, who accepted the same and paid as for a total loss. There was evidence tending to show that the vessel was worth more than the valuation in that policy, but the court held, that the plaintiff could not recover as for a total loss from the defendant, as he had voluntarily parted with all title to his ship. So, in *Rice v. Homer*, 12 Mass. 230, where loss by capture was exempted, and the vessel was damaged by perils of the sea, to an amount exceeding half her value, but no abandonment was made, and she was afterwards captured, the court held, that, as the assured could not deliver up the vessel, he could not recover as for a total loss. And if, after an insurance is made, the property is mortgaged, no abandonment can be made, if the mortgage subsists at the time of the loss. *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 249. See also *Smith v. Columbia Ins. Co.*, 17 Penn. State, 253; *Bidwell v. North-*

western Ins. Co., 19 N. Y. 179. In *Williams v. Smith*, 2 Caines, 13, the vessel, at the time the assured purchased her, was under a bottomry bond of an amount greater than her value, but of this fact the assured was ignorant. During the voyage, the vessel was abandoned for want of funds to carry on the voyage, but was sold under the bond before the underwriter obtained possession of her. Held, that the underwriter was liable only for the balance which remained after the sum for which the vessel was sold was deducted from the valuation. And if a bottomry bond is given during the voyage, which has not been paid, although the owners had an opportunity of paying it, it would seem that the assured could not abandon. *Allen v. Commercial Ins. Co.*, 1 Gray, 154. See also *Badger v. Ocean Ins. Co.*, 23 Pick. 347, 356.

² See, for sale to pay salvage, *post*, p. 151, n. 1; for sale under bottomry bond, *post*, p. 139, n. 3; and for sale by master, *post*, p. 145, n. 2.

³ *Center v. American Ins. Co.*, 7 Cow. 564; *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342, 369; *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131.

It has been held, that if there be an abandonment, and the insurers require an instrument of cession and transfer of the salvage, and the insured refuses to give it, he may still claim as for a total loss, because the abandonment did all that an instrument of cession could do.¹ If, however, the insurers had reason for their request, because, without such further instrument and the authority it gave, they could not recover the salvage, doubtless such cession would be held to be an essential part of the abandonment, and the latter would therefore be incomplete without it.²

SECTION III.—*Of Abandonment of the Ship.*

IF the insurance be on a ship, and it is wrecked, and becomes "a mere congeries of planks," it is still usual to abandon, although it is said not to be necessary to do so.³ So, if a ship be not heard from for a sufficiently long time, the presumption of an actual total loss will arise, and there may be a claim as for a total loss, without abandonment.⁴ But here, too, the insurers, by payment of a total loss, would be entitled to her, or any part of her which should afterwards be recovered.⁵

The property insured may have passed from the persons insured by a sale which was justifiable, because rendered necessary by a peril insured against. Then there need, perhaps, be no abandonment, but the claim may be for a total loss. The cases on this question are numerous and irreconcilable, as our

¹ *Hurtin v. Phoenix Ins. Co.*, 1 Wash. C. C. 400.

² *Hurtin v. Phoenix Ins. Co.*, 1 Wash. C. C. 400, 405, per *Washington, J.* In *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268, a deed of cession was given, but it was objected to, on the ground of its being informal. *Marshall, C. J.*, said: "The informality of the deed of cession is thought unimportant, because, if the abandonment was unexceptionable, the property vested immediately in the underwriters, and the deed was not essential to the right of either party. Had it been demanded and refused, that cir-

cumstance might have altered the law of the case."

³ *Cambridge v. Anderton*, 2 B. & C. 691, per *Abbott, C. J.*

⁴ *Gordon v. Bowne*, 2 Johns. 150. This point was raised, but not decided, in *Camberling v. M'Call*, 2 Yeates, 281, 2 Dall. 280. See also cases cited *ante*, vol. 1, p. 548, n. 1, in many of which it seems to have been assumed that no abandonment was necessary in such a case.

⁵ *Houstman v. Thornton*, Holt, N. P. 242, per *Gibbs, C. J.*

note¹ will show. But we think the better rule to be, that if the sale be justified by a sufficient necessity, and is free from objec-

¹ It is obvious that, if the circumstances are such that a total loss can be recovered without an abandonment, such a state of the salvage would not affect the rights of the assured. The proceeds, if retained by the assured, must be deducted from the amount of the total loss. See the following note. The precise question then, is, whether a sale will, in any case, take the place of an abandonment, or under any circumstances give a claim for a total loss, when there would not have been one without the sale.

In England, the question came up in *Allwood v. Henckell*, Park, Ins. 239; *Martin v. Crockatt*, 14 East, 465; *Bell v. Nixon*, Holt, N. P. 423; *Cambridge v. Anderton*, 2 B. & C. 691, Ryan & M. 60, 4 D. & R. 203, 1 C. & P. 213; *Doyle v. Dallas*, 1 Moody & R. 48; *Gardner v. Salvador*, 1 Moody & R. 116; *Roux v. Salvador*, 1 Bing. N. C. 526, 3 Bing. N. C. 266.

In *Allwood v. Henckell* [1795], the vessel was captured and recaptured, and sold under a decree of the Vice-Admiralty Court of Antigua, to pay one eighth salvage. There was no abandonment; but a total loss was claimed. Lord *Kenyon* was in doubt, but was inclined to think, "that an abandonment was necessary, and that the case was the same as if the property had remained in specie at Antigua, and had not been sold." The verdict was for an average loss. See *Hodgson v. Blackiston*, Park, Ins. 240, note. In most of the cases which followed this, the effect of a sale was not much considered, but the courts appeared to assume that it did not affect the nature of the claim. In *Martin v. Crockatt* [1811], there had been a sale,

but Lord *Ellenborough* said: "When the thing exists in specie, as it did here, I cannot say but that an abandonment is necessary." In *Gardner v. Salvador* [1831], *Bayley, J.*, said: "The question in this case is, whether you are satisfied that there has been a total loss by perils of the sea. I know of no such head of insurance law as loss by sale." In *Cambridge v. Anderton* [1824], the vessel "got upon rocks in the river St. Lawrence, in foggy and tempestuous weather. She was there much injured, and surveyed by experienced persons, who gave it as their opinion, that the expense of getting her off the place where she was lying (if that could be accomplished), and repairing her, would far exceed the value of her when repaired; under these circumstances, the captain and the agents for the plaintiff sold the ship, with her certificate of registry. The purchaser did succeed in getting her off the rock, took her back to Quebec, and repaired her." 2 B. & C. 691. The assured recovered a total loss, although there was no notice of abandonment. The decision was questioned by *Tindal, C. J.*, in *Roux v. Salvador*, 1 Bing. N. C. 488, and the broad rule laid down, "that whenever the assured claims for a total loss, there being anything saved, he must first relinquish to the underwriter all his interest in what remains." But the case of *Roux v. Salvador* was carried to the Exchequer Chamber, and the decision of the court below was overruled, and *Cambridge v. Anderton* was sustained. Lord *Abinger, C. B.*, referring to that case, said: "It is an express decision, that when the subject-matter insured has, by a peril of the sea, lost its form and species, where a

tion as to the manner of it, it passes the property completely from the insured. He has lost the whole, and may recover for

ship, for example, has become a wreck or a mere congeries of planks, and has been *bona fide* sold in that state, for a sum of money, the assured may recover a total loss without any abandonment." This is the extent to which the English decisions have gone in determining the effect of the *sale of a ship*.

It does not appear that if a ship were sold, on the ground that the expense of repairs would exceed her value when repaired, and on that ground alone, a total loss could be recovered without an abandonment. See *Fleming v. Smith*, 1 H. L. Ca. 513.

Substantially the same principle seems to have been adopted, where the *cargo* has been necessarily sold at an intermediate port.

In *Roux v. Salvador*, 3 Bing. N. C. 266, the cargo of hides, on a voyage from Valparaiso to Bordeaux, was necessarily unloaded at Rio Janeiro, where the vessel was obliged to put in for repairs. They were found to be in such a state of progressive putrefaction, that, if it had been attempted to carry them to Bordeaux, they would have lost their character of hides before their arrival. They were sold as hides, and brought the sum of £273, the valuation in the policy being £1,117. No notice of abandonment was given. In the Court of Common Pleas it was held that it was not a total loss, on the ground above stated. But in the Exchequer Chamber the decision of the Court of Common Pleas was overruled, and it was held to be an actual total loss. In that case, no expense would have caused the hides to arrive in specie, "they never could have arrived in the form of hides." A distinction was taken between the

case in which "it is wholly out of the power, of the assured, or of the underwriter," to procure the arrival of the thing insured, and the case in which goods "are not worth the expense of bringing them to their destination," and it was said, that, an abandonment was necessary in the latter case, and the court did not go so far as to hold, that a sale in such a case would dispense with notice of abandonment, and no English case appears to have carried the doctrine so far since. See *Rosetto v. Gurney*, 11 C. B. 176, 7 Eng. L. & Eq. 461, a case in which notice of abandonment was given.

In the late case of *Fleming v. Smith*, 1 H. L. Ca. 535, where the vessel was repaired at an expense exceeding her value when repaired, it was held, that the insured were not entitled to recover as for a total loss, as no abandonment had been made in due season. Lord Campbell said: "According to all the old authorities, a constructive total loss can only entitle the owners to recover as for an actual total loss, by a notice of abandonment; for though, in the judgment of the assured, it may be better not to repair the vessel, the underwriters may, with different means, give directions to repair, or may direct, and are entitled to direct, how the wreck is to be disposed of. It would be an extreme hardship for them to be called on to pay as for a total loss, without having the opportunity of making the most of the ship in its disabled state. The law, therefore, requires that notice shall be given, in order to convert a constructive into an absolute total loss. Then we come to the cases of *Cambridge v. Anderton*, and *Roux v. Salvador*. The Court of

the whole without abandonment. But if the assured abandons, the salvage or proceeds belong at once to the insurers, and are

King's Bench held, in *Cambridge v. Anderton*, without overturning the old authorities, that, in the peculiar circumstances of that case, a notice of abandonment was not necessary. But why? Because, coming down the St. Lawrence, the ship met with a serious misfortune, and the captain, after having taken the best advice, thinking it not worth repairing, sold it at once and conveyed a good title to the purchaser. The owners received intelligence of that sale at the same moment that they learned the injury which had happened to the vessel. In such circumstances, there was nothing to abandon. The ship was gone; the underwriters could not have taken possession of it, for it was lawfully transferred to the purchasers. Then comes the case of *Roux v. Salvador*, in which Lord Chief Justice *Tindal* held, that notice of abandonment was not necessary. There the hides were so injured that they ceased to exist as hides before reaching the port of destination; so that, though the substance of something remained, the substance of what had been insured was destroyed. But here the ship existed, was repaired, and brought home a cargo to England." But the answer to all Lord *Campbell's* reasoning is, that he is supposing a case where the sale is *not* justified by an adequate necessity. For if the owners or insurers could have directed her disposition, they should have had an opportunity.

In *Knight v. Faith*, 15 Q. B. 649, the vessel was injured and carried into port, and it was there found that the necessary repairs could not be made there, as there was no dock-yard, men, or materials, and that the vessel could not

have been taken to any other port where repairs could have been made. She was accordingly sold by the master for £72 10s. No abandonment was made, and it was held, that the assured could not therefore recover a total loss. Lord *Campbell*, C. J., said: "For there is no such loss known in insurance law, as a sale by the master, unless it be *bartrous*; and a *bona fide* sale by the master can only affect the insurers, when it becomes necessary by prior damage, arising from a peril for which they were answerable."

In *Irving v. Manning*, 1 H. L. Ca. 287, 6 C. B. 391, where the expense of repairs would have exceeded the value of the vessel when repaired, an abandonment was made, and the insured recovered. So, in *Young v. Turing*, 2 Man. & G. 593. And the insured may not be entitled to recover in all cases, even if he abandons, as where the damage of itself does not amount to a total loss, but the ship, on account of old age, is not worth repairing. *Cazalet v. St. Barbe*, 1 T. R. 187.

These English cases appear to leave it somewhat uncertain, what is the precise effect of a sale when justified by necessity, upon the rights of the assured. A still greater uncertainty exists in the American law upon this point.

The doctrine, that there need be no abandonment, in case of a sale by necessity, is supported by several cases. *Fuller v. Kennebec Ins. Co.*, 31 Maine, 325; *Prince v. Ocean Ins. Co.*, 40 Maine, 481; *Mutual Safety Ins. Co. v. Cohen*, 3 Gill, 459. In *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 249, it was held, that, as the legal title passed

afterwards at their risk; if he does not, they are at his risk, to the vendees when a ship was necessarily sold, no interest remained in the insured, and they had nothing to abandon, and consequently an abandonment was not necessary. See *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456, 464, per *Putnam, J.* The question arose in the case of *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 623, but the court did not deem it necessary to decide it. They however said: "It may not be amiss to observe, that there is very respectable authority, and that, too, founded upon pretty substantial reasons, for saying that no abandonment is necessary, where the property has been legally transferred by a necessary and justifiable sale. 2 Pick. 261, 265." There is also a dictum to this effect in *Ware v. Peck*, 18 How. 267, 269, by *Grier, J.* In *Smith v. Manufacturers' Ins. Co.*, 7 Met. 448, the vessel was condemned and sold. She could have been repaired, at an expense less than her value when repaired, and no abandonment was made. *Shaw, C. J.*, delivering the opinion of the court, held that the insured could not recover for a total loss, on the ground that the cost of repairs would not have exceeded her value when repaired, but expressed the opinion that, but for this latter fact, the assured would have been entitled to recover; and speaking of *Roux v. Salvador*, as first decided, said: "But the subject has undergone an elaborate discussion in a recent case, in which, after a full review of all the cases, it was held that, even where the property insured had been sold, and the news of the sale arrived as soon as that of the loss, and where there was a total loss, but not an actual total loss by the destruction of the thing itself, there could not be a recovery for a total loss without abandonment, and this is well supported in principle, as well as by authorities." The dictum of *Shaw, C. J.*, to the point, that, if the expense of repairs would exceed the value of the vessel when repaired, the insured might recover as for a total loss, without an abandonment, is supported by the case of *Bullard v. Roger Williams Ins. Co.*, 1 Curtis, C. C. 148, where the vessel was condemned and sold. See also, for a decided confirmation of this rule, *Graves v. Wash. Ins. Co.*, 12 Allen, 391. But in *American Ins. Co. v. Francia*, 9 Barr, 390, where the jury found that the cost of repairs would so far have exceeded the value of the vessel when repaired, that no prudent man could have doubted as to the propriety of selling the vessel, and that the sale was made under circumstances which rendered it legal, the court held, that the insured could not recover for a total loss, without an abandonment. *Roux v. Salvador* was also referred to, and a preference expressed for the doctrine laid down in the earlier decision of that case.

The result of the authorities appears to be, that in England the assured need not abandon in case of a valid sale, but, if there is no sale, he must abandon, if the vessel remain in specie, although the expense of repairs would exceed the value of the vessel when repaired. In this country, the authorities are so conflicting, that no general rule can be deduced from them. The dictum of *Shaw, C. J.*, *supra*, seems inconsistent with the rule, that the valuation is conclusive as to the value of the vessel at all times, which is the settled law of Massachusetts. See *post*, p. 134, n. 2. In *Greely v. Tremont Ins. Co.*, 9 Cush. 415, the ship remained in specie and was sold by the master. The estimated amount

because, if he claims for a total loss, he must in any event account for them as diminishing his loss.¹

No constructive total loss can be claimed by reason of a sale of a vessel at a port of distress, unless the sale is made by the master, if he is present and in charge of the vessel.²

Whether a partial loss may be converted by abandonment into a constructive total loss must necessarily depend, in almost all cases, upon the amount of the injury. Originally, it was held, that this could be done only where the ship was incapable of repair or recovery, or, if capable, so much injured that when repaired or recovered she would not be worth what it would cost. Such may be said to be the rule in England now.³ But

of repairs, including the general-average charges, amounted to more than the value of the vessel, and to more than her valuation in the policy. Held, that the sale did not render the loss an actual total one of itself, and that the general-average expenses were not to be added.

¹ Thus, in *Smith v. Manufacturers' Ins. Co.*, 7 Met. 448, *Shaw, C. J.*, said: "An abandonment changes the character of the master. It relates back to the time of loss; and as the master is authorized to labor, etc., in saving, for the benefit of all concerned, if there has not been an abandonment, he is the agent of the owner and assured, and, if he receives money, it is for their account; if he squanders or wastes it, it is their loss. But, if there has been an abandonment on good grounds, it relates back, and makes the master the agent of the underwriters from the time of the loss, so that, if the salvage has been squandered, it is their loss." If there has been no abandonment, "the salvage is not a set-off, not something belonging to the defendants, to be used to balance the plaintiff's total demand; but it is a sum belonging to the plaintiff, in his own hands,

which diminishes his demand *pro tanto*, and to the same extent diminishes the amount he is entitled to recover." See also *Roux v. Salvador*, 3 Bing. N. C. 266.

² *Paddock v. Comm. Ins. Co.*, 2 Allen, 93.

³ In *Moss v. Smith*, 9 C. B. 94, the vessel, on a voyage from Valparaiso to London, was injured by the perils of the sea, and put back to Valparaiso. She was there sold, on account of the damage and the difficulty of raising money to make the repairs. At *nisi prius*, *Wilde, C. J.*, instructed the jury as follows: "That if, upon the evidence laid before them, they were satisfied that the vessel was damaged, by perils of the sea, to such an extent that she was not susceptible of repair, so as to enable her to perform the voyage, save at an expense which would exceed her value when repaired, regard being had to the facilities for repair and for raising money for that purpose at Valparaiso, and the time that would be consumed therein, they must find for the plaintiffs, as for a total loss of the ship; and that, on the other hand, if they thought that the vessel, when properly repaired, would be worth more

*Emp. doc. =
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in this country this has been much modified by a practice, which has become a rule that is in force in nearly all parts of the country, and which was not wholly unknown on the continent of Europe. It is that if more than half of the property insured be lost, or if the property be damaged to more than half its value, by a peril insured against, this may be made a constructive total loss by abandonment.¹ We say, *more* than half; for it is not sufficient,

than the sum expended in such repairs, the plaintiffs would be entitled to recover for an average loss only." In the Common Pleas this ruling was held to be correct. See also *Fleming v. Smith*, 1 H. L. Ca. 513; *Irving v. Manning*, 1 H. L. Ca. 287, 304, 6 C. B. 391.

¹ *Dupuy v. United Ins. Co.*, 3 Johns. Ca. 182; *Depeyster v. Col. Ins. Co.*, 2 Caines, 85; *Wood v. Lincoln and Kennebec Ins. Co.*, 6 Mass. 479; *Dickey v. New York Ins. Co.*, 4 Cow. 222, S. C. *nom.* *Dickey v. American Ins. Co. of New York*, 3 Wend. 658; *Saurez v. Sun Mut. Ins. Co.*, 2 Sandf. 482; *Allen v. Commercial Ins. Co.*, 1 Gray, 154.

The following extracts, when compared with that in the preceding note, will show that, as far as the ship is concerned, the principle upon which the American rule is founded may be regarded as substantially the same with that of the English cases. In both countries the loss is total when the vessel becomes a wreck; but under the American rule she is said to be a wreck when the expense of repairs will exceed half her value when repaired. In *Wood v. Lincoln & Kennebec Ins. Co.*, 6 Mass. 479, 482, *Parsons, C. J.*, said: "When a ship becomes a wreck, by any of the perils insured against, it is generally a total loss, and the owner may abandon. And a ship becomes a wreck when, in consequence of the injury she has received, she is rendered absolutely innavigable,

or unable to pursue her voyage, without repairs exceeding half her value." In *Coolidge v. Gloucester Mar. Ins. Co.*, 15 Mass. 341, 343, *Putnam, J.*, said: "But to all legal purposes, after the constructive total loss, the ship, repaired and rebuilt at an expense exceeding half her value, must be considered as a new ship,—as much so, to every intent, as if the former owners and the insurers of her had procured a new keel, and had wrought up the iron and timbers which could have been obtained into a vessel of a different kind and form." See *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, 74, per *Story, J.* In *Allen v. Commercial Ins. Co.*, 1 Gray, 154, 157, *Thomas, J.*, said: "It is a general rule in this country, that if a ship is damaged to more than half the value by any peril insured against, the assured may abandon and recover for a total loss. Though a different rule is adopted in England, and this may, perhaps, be regarded as a departure from the original economy of insurance, which was indemnity to the assured, it has the advantage of affording a fixed and definite standard, and is too well settled to be the subject of controversy." And *Chancellor Walworth*, in *American Ins. Co. v. Ogden*, 20 Wend. 287, 300, observes: "The rule of permitting the assured to abandon, when the vessel has been injured to more than half her value, does not exist in England. It was first adopted in this country, from a similar rule in relation

that the cost of repairing the vessel would be equal to fifty per cent, but it must exceed that amount, in order that the insured may be entitled to recover.¹

This rule applies in this country to ship and goods, but not, as we think, to freight. It does not, however, exclude all cases where the damage is less than fifty per cent, if that damage be not repairable } for if the repairs would cost less than half of her value, but are impossible, because the master has no funds and can raise none, and the owners are too distant for advice or assistance, the master may sell the vessel, if this be plainly the only thing he can do.² If, however, the vessel is at a port of destination, this rule

to an insurance upon the cargo, in some of the other maritime countries of Europe; and, among other, in France, according to Pothier. See Cleirac, 278, Le Guidon de la Mer, ch. 7, § 1; Pothier, Traité du contrat D'Assur. 118. And it is now adopted as a part of the maritime law of France, in terms, by the more recent commercial code of Napoleon; except that the new code requires that the loss should be at least three fourths of the value of the property insured, to authorize an abandonment on that account. Code de Comm. art. 369. As this principle of adopting an arbitrary rule of proportion between the value of the vessel and the expense of repairing her at the port of distress, for the purpose of ascertaining the right of the assured to abandon as for a total loss, was substituted for the more uncertain rule which exists in England, of leaving it to the jury to determine, as a matter of fact in all cases, whether the situation of the vessel was such as to make it a justifiable case of abandonment, or of a sale of the ship for the benefit of all parties, the courts of this country should be cautious how they depart from the established rule, or they will find the underwriters and the assured again involved in the ruinous liti-

gation which the adoption of a fixed and certain rule was intended to obviate."

In *Marine Dock & Mut. Ins. Co. v. Goodman*, 4 Am. Law Register, 481, 496, the Supreme Court of Alabama said, that, but for the fact that the policy contained a clause authorizing an abandonment, if the damage amounted to fifty per cent, they should follow the English doctrine in respect to what constituted a total loss, in preference to the French rule, "which has been adopted by some American courts."

¹ *Fiedler v. New York Ins. Co.*, 6 Duer, 282.

² *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342. In this case, *Duer, J.*, states the law as follows: "When the impossibility of making the necessary repairs is occasioned by the want of materials and workmen, it is not denied that such is the law; but we consider the law to be just as clearly settled that it is quite immaterial, whether the impracticability of making repairs, when the vessel is in a port of distress, proceeds from the want of materials and workmen, or of the necessary funds or credit. It is the existence of the fact, and the necessity of breaking up the voyage, which it creates, that justify an abandonment."

does not apply, for the owner is obliged to furnish funds at such a place.¹

There seems to be but one limitation or exception to the rule of fifty per cent, although even this may not be entirely certain; it is, that if the vessel actually perform the voyage insured and reach her terminus *ad quem*, there can be no abandonment of her merely because she needs repairs from perils insured against, which will cost more than half her value.²

And *Thomas, J.*, in *Allen v. Commercial Ins. Co.*, 1 Gray, 154, 158, said: "But the right to abandon and claim for a total loss, existing in cases of injury to an amount greater than half the value of the ship, is not restricted to them. If this vessel had been in a port of necessity, in the condition described in the report, and the master had found it impossible to obtain the requisite funds for her repair by bottomry or otherwise, or to consult the owners, a sale might have been justified; and upon abandonment, no lien or encumbrance having been created to deprive the underwriter of the rights which it is the object of an abandonment to secure, a total loss might have been claimed, though the cost of repair would have been less than fifty per cent." See also *Williams v. Smith*, 2 Caines, 13, and next note.

¹ *Amer. Ins. Co. v. Oden*, 20 Wend. 287. In *Allen v. Commercial Ins. Co.*, 1 Gray, 154, the vessel arrived at her port of destination in such a condition, that her estimated repairs were \$5,248. This sum, after deducting one third, new for old, was less than half her value. The owners were present, but, as they had no funds, the vessel was sold. Held, that the underwriters were not liable for a total loss. And even in a port of necessity the master is not authorized to sell the vessel for want of means to repair her, if such means can be obtained by the exercise of proper diligence, either on

the credit of the owner, or by pledging as security a part or the whole of the interest under his charge. And, indeed, the diligence and efforts of the master are not to be limited, in all cases, to the port in which the vessel has found a refuge. *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342.

² In *Peters v. Phoenix Ins. Co.*, 3 S. & R. 25, it was held in such a case, that the assured might abandon and recover as for a total loss. The point, that the voyage had been completed, does not seem to have been considered. See also *Ralston v. Union Ins. Co.*, 4 Binn. 386. It was held the other way in *Pezzant v. National Ins. Co.*, 15 Wend. 453, and in *Parage v. Dale*, 3 Johns. Ca. 156. In *Scottish Marine Ins. Co. v. Turner*, 4 H. L. Ca. 312, note, 20 Eng. L. & Eq. 24, 37, Lord Chancellor *Cranworth* said: "I am not aware, indeed, of any previous case in which, after a ship had actually performed her voyage, the owners have been permitted, even between themselves and the underwriters on the ship, to treat an injury sustained on the voyage as a total loss, and abandon the ship to the underwriter after her arrival in port." See also the language of Lord *Truro*, on page 39. The case referred to was that of *Stewart v. Greenock Marine Ins. Co.*, 2 H. L. Ca. 159, in which an abandonment was allowed after the vessel's arrival. But if she arrives a mere wreck, it would

Many questions arise in respect to the estimate or computation of this half or fifty per cent of damage. Thus, can the allowance usually made, of *one third new for old*, in settling a partial loss, be first deducted? If a vessel newly coppered meets with an accident, requiring that her copper should be taken off and renewed, or if her new sails be blown away and the cost of other new ones must be furnished by the insurers, the owner gains nothing. If the copper or the sails be nearly worn out, he may gain by new ones nearly their whole value. It is very difficult to estimate the particular facts of each case, so as to apply the principle of indemnity. Hence the custom has grown up, to deduct, in all cases, one third from the cost of new materials, as, upon the whole and by way of average, about what indemnity would require. Now, shall this deduction, "one third off, new for old," be made when the question is, whether the loss, which would otherwise be total, becomes partial if the deduction is made? A ship will be worth \$20,000 when repaired. These repairs will cost \$14,000. If one third is to be deducted, they will not equal half of her value, and the loss will not be total, nor can there be abandonment. If one third is not to be deducted, the loss is then more than fifty per cent. This question has been much disputed. Many policies expressly provide that the fifty per cent shall be adjusted as for a partial loss; that is, that the one third shall be deducted; or, in other words, the loss must be more than three fourths of her value. But the later and stronger authority, and we think the better reason, would require that this one third should not be deducted, or, what comes to the same thing, if deducted from the repairs, should be deducted from the value of the ship, unless this deduction from the repairs be expressly stipulated.¹

seem that an abandonment might be made, or the loss considered a total one with salvage.

In *Ralston v. Union Ins. Co.*, 4 Binn. 386, it was held, that, if the vessel arrived at her port of destination, the assured could not abandon, if the injury previously sustained did not amount to fifty per cent, although the ship could not be repaired at all at that port, and was not sea-worthy to go to another.

¹ The doctrine of the text has been sustained by the Supreme Court of New York, in *Dupuy v. United Ins. Co.*, 3 Johns. Ca. 182; by Mr. Justice Story, in *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, 73, after a very thorough consideration of the question; by the Supreme Court of the United States in *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378; and by the Court of Chancery, in *Mobile, Ala., in Marine Dock & Mutual*

Recently a special clause has been introduced into our marine policies, relating to the deduction in case of recoppering. The one third off, new for old, is but a compromise, intended to do justice on the whole, and rendered necessary by the difficulty of determining in each case how much is lost or gained by the replacement of old material by new material. But it is thought that this result may be more accurately reached in the case of copper, which usually wears away at a tolerably uniform rate, by measuring the diminution of value by the age of the

Ins. Co. v. Goodman, 4 Am. Law Register, 481, 497. This last case proceeds on the ground, that the market value of the vessel is injured, by being repaired, to the extent of one third the cost of repairs, as much as the new work is worth one third more than the old. See also Phillips v. St. Louis Perpet. Ins. Co., 11 La. Ann. 459; and *dicta* by Senator Allen, in Am. Ins. Co. v. Center, 4 Wend. 45, 54, and by Gibson, J., in American Ins. Co. v. Francia, 9 Barr, 390.

On the other hand, it is held, that one third is to be deducted in all cases, in Smith v. Bell, 2 Caines, Ca. 153; Pezant v. National Ins. Co., 15 Wend. 453; Fiedler v. New York Ins. Co., 6 Duer, 282; Hooper v. Whitney, 19 La. 267. In Massachusetts, the following clause has been introduced into the policies: "It is agreed, that the insured shall not have the right to abandon for the amount of damage merely, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured." This clause, it appears, was introduced on account of the decision of Mr. Justice Story, in the above case of Peele v. Merchants' Ins. Co. See Orrok v. Commonwealth Ins. Co., 21 Pick. 456, 467. In several cases containing this clause, where the question has come up, the decision that the

deduction is to be made has proceeded as much on general principles and usage as on any effect given to this clause, it being considered as merely affirming the law. Sewall v. United States Ins. Co., 11 Pick. 90; Winn v. Columbian Ins. Co., 12 Pick. 279; Deblois v. Ocean Ins. Co., 16 Pick. 303; Allen v. Commercial Ins. Co., 1 Gray, 154. The policy in the above case of Deblois v. Ocean Ins. Co. contained the clause in question, although this fact does not clearly appear in the report of the case.

And where the insurers are not to be liable for a partial loss under a certain per cent, it has been held, that one third is to be deducted in making up this percentage. Wallace v. Ohio Ins. Co., 4 Ohio, 234; Perry v. Ohio Ins. Co., 5 Ohio, 305.

In Robinson v. Commonwealth Ins. Co., 3 Sumner, 220, the question was whether there was a total loss of the cargo by the breaking up of the voyage, on account of the total loss of the ship. The policy contained the clause referred to. It was held by Story, J., that it was solely applicable to the case of an insurance upon the ship, and had nothing to do with an insurance upon the cargo. See also *post*, ch. on Partial Loss. In Heebner v. Eagle Ins. Co., 10 Gray, 143, the policy did not contain the clause in question, but the court applied the Massachusetts rule.

copper. The clause adopted for this purpose varies somewhat in different policies. In one which now lies before us it reads thus: "It is specially agreed that, instead of deducting one third for new in the article of copper sheathing, there shall be deducted two and a half per cent of the cost of recoppering, after deducting the value of the old copper and nails, for each and every month the copper shall have been on the vessel *at the time of recoppering*; and if the copper shall have been on forty months, the cost of recoppering shall be wholly borne by the assured."

Under this clause a case has arisen, and is, when we write, under reference, involving a new question. The same policy contains the now usual clause, that the assured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay, under an adjustment as for a partial loss, shall exceed half the amount insured. In this case the ship was wrecked and sold. Her copper had been on her so long that only a small amount would have been payable by the insurers, on account of the copper, had she been recoppered. This small amount, added to the other estimated cost of repair (one third off), would not have been more than half her value. But if two thirds of the whole cost of coppering had been added, the whole cost would have been more than one half. She was not recoppered in fact; and the question whether the insured could abandon as for a total loss would depend upon whether the words in the new clause, "*at the time of recoppering*," limit the effect of the clause to the case where the vessel actually is recoppered. The prevalent opinion seems to be in favor of so restricting it. But it seems to us that a strong objection to this view arises from the fact that it would exclude this new clause from any effect whatever, in cases of constructive total loss, and limit it, in practice, to those of partial loss; for it is very seldom that a ship so badly injured that her repairs would cost more than three fourths of her value is actually repaired. A case not without its bearing upon this question was decided in Massachusetts in 1857. The policy contained this clause, "not liable for any repairs in California." She ran on a rock in entering the port of San Francisco. We give in our note the instruction of the court at *nisi prius*, and the decision of the whole court for the plaintiffs, with their reasons for it. We think the same reasons

would tend to the conclusion, that whether the ship could be abandoned for damage, on the ground that the cost of repair would exceed three fourths of her value, would be determined by the general rule of one third off, new for old, where there was no actual recoppering.¹

¹ *Lincoln v. Hope Ins. Co.*, 8 Gray, 22. The court instructed the jury, that if the vessel could not be thoroughly repaired at San Francisco at a cost less than three fourths of her value, nor partially repaired there and thoroughly repaired at New York for such sum, including expenses of navigation thereto, the owners had a right to abandon, and recover for a total loss." But for a special provision in this policy, no question could be made as to the correctness of these instructions. That provision or limitation is, "not liable for repairs made in California." The plaintiffs made no repairs in California, and make no claim for repairs there. But the defendants say that, under the policy, the insured have not the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured; that the criterion is the damage which the insurers would be liable to pay; and that, as no expense of repairs at San Francisco is to be paid by them, said expense is to be excluded in the estimate for a constructive total loss. Such is not, we think, the sensible and just construction of the contract. Whether the defendants are to be liable for repairs made in California is one thing; whether the vessel is to be deemed constructively lost upon an estimate for repairs made at the place of the injury is another. The provision in the printed policy is made *alio intuitu*, and in reference to the general principles by which the right to

abandon, where there is not an absolute loss, is to be regulated. The parties have used a printed form of policy, containing the provision common to policies in this Commonwealth, as to the right to abandon for the amount of damage merely. They have inserted a limitation in another part of the policy, by which they are "not liable for repairs made in California." What the insurers meant to guard against was, we think, the being liable, in case of partial losses, for repairs as such, made in California, at the enormous prices at which only, as it is well known, labor and materials could then be procured in that country. We think the exception was not designed to affect the right of the insured to abandon and claim for a total loss. Such a construction of the contract would defeat its purposes. That the vessel was intended to be used in the Pacific is shown from the face of the policy, indeed from the very exception itself. But this construction would render the policy of little or no value while on or near the coast of California. If the loss was such that it could be repaired in California at an expense less than half the amount insured, the assured must, of course, bear it themselves. It would fall within the exception. If the vessel could be repaired in California, and the expense would exceed half the amount insured, the plaintiffs, under the construction of the defendants, must also pay the expense, and could not abandon. If the expense of partial repairs at California, and of complete repairs at New York, and the expense of

Another special clause in relation to the copper provided, in another case, that the insurers should not be liable for any loss or expense in replacing the copper now at the bottom of said vessel, should the same be removed for any cause whatever, but should be liable for the loss and expense that might happen after she should be new coppered. Sea perils insured against made it necessary to take off her copper bottom, and, to make her sea-worthy, to put on what is called "a brimstone bottom." It was held that the expense of this new bottom (about half as much as that of a copper bottom) was to be included in computing a constructive total loss.¹

The cost of raising or otherwise recovering and repairing an injured ship is, of course, the first measure of the damage. The question, however, has been raised, whether, if an important part of this cost rests on the ship, together with other interests, so as to make a case for general average, that part of the cost which by the adjustment would fall on the ship should be included in the cost of recovery. The general principles of insurance would undoubtedly answer in the affirmative, and this has been distinctly held in a recent interesting English case. A ship was submerged in deep water with a heavy cargo on board; there was a common peril of destruction imminent over ship and cargo as they lay submerged; the most convenient mode of saving ship or cargo, or both, was by raising the ship together with the cargo; the cost of raising would be an extraordinary expense for the common benefit of both, and the cargo would be liable to general-average contribution, and the ship-owner would have

navigation thereto, should exceed half the amount insured, the plaintiffs could not abandon and claim for a total loss; they could only recover for the expense of navigating the vessel to New York, and of the additional repairs made there. The only event in which they could abandon and claim for a constructive total loss would be, when, having paid themselves the expense of repairs at California, to make the vessel navigable and sea-worthy to New York, it was found that the expense of the additional repairs at New York, and of her navigation to that port, would exceed

three fourths of her value, allowing one third new for old,—a contingency not very likely to occur. This construction would substantially, and to all practical purposes, defeat the right to abandon and to claim for a total loss by reason of the extent of damage. Such, we think, were not the intent and purpose of the exception. It has a clear, definite purpose to be effected, without thus extending it, to wit, to release the underwriters from the expense of repairs in California in case of partial losses."

¹ *Prince v. Equitable Ins. Co.*, 12 Gray, 527.

a lien on the cargo to secure payment of that general average. The ship being insured, it was held, that, in determining whether or not the ship was a constructive total loss, the amount of general average which would be contributed by the cargo must be taken into account, and the cost of raising the ship calculated as reduced by that amount.¹

Another question is, whether the valuation in the policy is to be taken, in determining whether the amount of damage will justify an abandonment, or is to be set aside and the actual value taken.² The authorities are not only irreconcilable, but, as

¹ *Kemp v. Halliday*, 1 Q. B. 1866, 519.

² The valuation is set aside, and the value at the time of the loss taken, in the following cases: *Peele v. Merchants' Ins. Co.*, 3 Mason, 27; *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378. See also *Marine Dock and Mut. Ins. Co. v. Goodman*, 4 Am. Law Register, 481; *Fontaine v. Phoenix Ins. Co.*, 11 Johns. 293; *Center v. American Ins. Co.*, 7 Cow. 561, 579.

In Massachusetts, the valuation in the policy is considered conclusive. The reasons which led to this result are so ably set forth by Mr. Justice *Putnam*, in *Deblois v. Ocean Ins. Co.*, 16 Pick. 303, 312, that we are induced to cite them somewhat at length: "In regard to the value, we must recollect it was fixed by the agreement of the parties. It is admitted, that if the vessel were absolutely lost, when returning to her home port, after a three years' voyage and essential deterioration, the value in the policy should be paid. And we cannot perceive any good reason why that value should not govern as well when the assured claims for a technical total loss as when he claims for a loss by the total destruction of the ship; and why it should not govern when the assured would lose, as well as when he would gain by it. . . . If the vessel sustained

damage at a time when she was in great demand, the owner would repair her. If at a place where there was an embargo, and where vessels were of comparatively little value, then he would work up the repairs to more than half her value in the market there, claim for the whole, and throw the vessel upon the underwriter. Wreck or not, total or partial loss, would depend upon the ever-shifting state of the market, and not, as it should, upon the condition of the ship. She might be almost worthless at the place where she was damaged, and in another, and perhaps not distant port, would sustain a fair and reasonable value. It was to avoid these and other uncertainties, and causes of litigation and dispute, that the parties agreed upon the valuation in the policy. It was to continue the same, although the vessel should grow worse. It was to continue the same wherever she might go under the policy, although she might in some places be worth more, and in some places less, than the value agreed on. It was to be coextensive with the voyage as to time and place." In this case, the vessel was valued at \$6,000, the repairs were estimated at \$3,798, and the ship was sold at auction for \$1,708. See also *Winn v. Col. Ins. Co.*, 12 Pick. 279; *Hall v. Ocean Ins. Co.*, 21 Pick. 472; *Orrok v. Commonwealth Ins. Co.*, 21

our note will show, they are so equally balanced that no rule can be stated as the prevailing one. On the reason of the case, we are inclined to hold, that the valuation should not apply to the question of total loss by construction, unless this be stipulated in the policy.

It is also a question, whether the premium should be included ;

Pick. 456; *Allen v. Commercial Ins. Co.*, 1 Gray, 154. In New York, the rule seems to be the same as in Massachusetts. *American Ins. Co. v. Center*, 4 Wend. 45; *American Ins. Co. v. Ogden*, 20 Wend. 287. In *Howell v. Philadelphia Mut. Ins. Co.*, U. S. C. C., Maryland, 25 Hunt's Merch. Mag. 80, the policy contained a clause stipulating that the valuation should be conclusive in case of a constructive total loss.

In England, we have seen, that a constructive total loss is one, where the vessel when repaired would be worth less than the cost of repairs, while some authorities in this country consider such a loss an actual one, to recover for which no abandonment is necessary. This latter rule may sometimes conflict very much with the rule, that the valuation is conclusive. If a vessel is at an intermediate port in such a condition that the cost of repairs would not exceed half the valuation in the policy, but the vessel when repaired would be worth less than the cost of the repairs, according to the one rule the assured could not recover for a constructive total loss, while according to the other he could recover for an actual total loss, without an abandonment.

The question came up in the case of *Hyde v. La. State Ins. Co.*, 14 Mart. La. 410. The vessel was injured by a collision, to an extent less than half the valuation, but she was in so rotten a state, that the cost of repairs would have exceeded her value when repaired, and

the court held that the assured could not abandon and recover for a total loss. And in *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456, evidence that the vessel after being repaired would have been of less value than before the injury happened, was rejected as inadmissible.

In the late case of *Irving v. Manning*, 1 H. L. Ca. 287, 6 C. B. 391, the vessel was valued at £17,500, the cost of repairs would have amounted to £10,500, and the ship would have been worth £9,000. An abandonment was duly made. If the valuation had been taken as conclusive of the value of the vessel at the intermediate port, the loss would not have been total; but the court held, that the valuation was conclusive only "for the purpose of ascertaining the amount of compensation to be paid to the assured, in order to avoid disputes as to the quantum of the assured's interest"; but that it did not mean that, when a question should arise whether it would be worth while to repair, the valuation was to be taken as conclusive of the value of the vessel. So in *Allen v. Sugrue*, 8 B. & C. 561, where the vessel was valued at £2,000, and could have been repaired for £1,450, but the jury found that the vessel was not worth repairing, the court held that the loss was total. See also *Edington v. Jackson*, and *Herne v. Ray*, cited 1 H. L. Ca. 294; same cases *nom.* *Eggington v. Lawson*, and *Herne v. Hay*, cited 6 C. B. 414; *Young v. Turing*, 2 Man. & G. 593.

and we are of opinion that it should not, or else that it should be included also in estimating the amount of the value insured.¹

Neither are the wages and provisions of the crew, during a detention, to be included as a part of the loss. And if repairs are made, and the crew are employed in making them, their wages will not be included.² Surveyors' fees, and other expenses incurred in ascertaining the cause of the loss, are not included.³ But payment of salvage due from the ship⁴ would be included. So is the expense of raising a submerged vessel and taking her into port for repairs.⁵ And a loss by payment of general-average contribution, or a loss giving rise to a claim for contribution, but of which the contribution is not yet paid, should, we think, be included (where nothing in the policy prevents it), and the insurers take by abandonment the claim for contribution.⁶ But,

¹ In *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, the insurer was not to be liable for any partial loss, unless it should amount to five per cent. It was held, that the percentage should be recovered on the valuation, after deducting the premium. See *ante*, Vol. I. p. 271, n. 1. In the absence of any express agreement, it would seem, that the same rule should apply in estimating the fifty per cent.

But in *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456, the question came up on a policy containing the clause: "It is agreed that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurer would be liable to pay, under an adjustment of a partial loss, should exceed half the amount insured." *Putnam, J.*, said: "But the meaning of the clause in the policy concerning the right to abandon on account of damage exceeding fifty per cent of the amount insured is too plain for construction or explanation. The premium is expressly made to be part of the amount insured, and the damage to be paid must exceed half

that amount, calculating the same as under the adjustment of a partial loss." In *Louisville Marine & Fire Ins. Co. v. Bland*, 9 Dana, 143, it was held, that in ascertaining the value under an open policy the whole premium is to be added to the prime cost, and other charges at the port of shipment; and that in estimating the value of a portion of the cargo, of which the entire valuation only is stated in the policy, a proportional part of the premium should be included.

² See *post*, ch. on Partial Loss.

³ *Fiedler v. New York Ins. Co.*, 6 Duer, 282; *Hall v. Ocean Ins. Co.*, 21 Pick. 472, 478.

⁴ *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378.

⁵ *Sewall v. U. S. Ins. Co.*, 11 Pick. 90; *Ellicott v. Alliance Ins. Co.*, 14 Gray, 318.

⁶ In Massachusetts, owing probably to the clause making the right to abandon depend upon the loss amounting to fifty per cent when adjusted as a partial loss, it is held, that those charges which are properly the subject of general-average contribution are not to be con-

if the contribution has been paid, only the balance of loss, after deducting this contribution, is to be included in the fifty per cent.

The expense of repairs is, in general, to be estimated at the place where they were actually made, or at which they would have been made, if made at all. But if a vessel can be partially repaired at a port of distress, so that she can be taken to another port and there fully repaired at a less expense than at the first port, it would seem to be the duty of the assured to do this, and consequently the underwriters are only liable for the lesser expense.¹ But the cost of navigating the vessel from the port of

considered in making up the fifty per cent. *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456; *Hall v. Ocean Ins. Co.*, 21 Pick. 472; *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191; *Ellicott v. Alliance Ins. Co.*, 14 Gray, 318. See also *Fiedler v. New York Ins. Co.*, 6 Duer, 282. And it was so held, in a case where the vessel was in ballast at the time, and there was no cargo or freight to contribute. *Greely v. Tremont Ins. Co.*, 9 Cush. 415.

That, generally, general-average charges may be estimated in computing the damages, was recognized in *Pezant v. National Ins. Co.*, 15 Wend. 453; but, as the same person owned both ship and freight, the court held he could not recover from the underwriter on the ship the whole amount, but must first deduct the proportion due from the cargo and freight, and then the remainder could be added to the other items to make up the fifty per cent.

In regard to the cargo, it has been held in Massachusetts that goods lost by jettison may properly be taken into the estimate in making up the amount of more than fifty per cent, necessary to authorize an abandonment. *Forbes v. Manufacturers' Ins. Co.*, 1 Gray, 371.

See also *Moses v. Columbian Ins. Co.*, 6 Johns. 219.

¹ *Center v. American Ins. Co.*, 7 Cow. 564, 4 Wend. 45. It was held in this case, that the assured had a right to have his vessel placed *in statu quo*, and that, if she had been coppered before the accident, the expense of sheathing her with the same material should be taken into account, although a sheathing of wood might render her sea-worthy for the voyage. The expense of the temporary repairs, added to the cost of the final repairs at the port of destination, would have amounted to more than half her value, and the question therefore did not arise, whether, had temporary repairs been sufficient to enable the vessel to perform her voyage, and at the port of destination thorough repairs might have been made, the whole cost of which would have been less than half the value, the assured could have abandoned if the entire repairs at the port of distress would have been more than half the value.

In *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456, the vessel put into Malaga in distress, and the court held, that if the master could not have made complete repairs at Malaga for less than one half the value of the vessel, but could have

distress to the port where the final repairs are to be made is to be added, if such a port is one to which the vessel would not have gone in the course of the voyage.¹ And, although the process of repair or renewal replaces with sound materials those which had been deteriorated by time and natural decay, no allowance beyond the one third is to be made for this.² And the

made partial repairs there, and then have carried his vessel to Gibraltar, and there have made complete repairs, and the whole expense would not have exceeded one half of such value, the master was bound to do this, and the loss was not total. So, in *Hall v. Franklin Ins. Co.*, 9 Pick, 466, where the cost of repairs at the port of distress would have exceeded the value of the vessel, the court held the loss was not total, as the vessel might have been safely navigated to another port and there repaired, and the whole expense would have been less than half the value of the vessel. See, *contra*, *Saurez v. Sun Mutual Ins. Co.*, 2 Sandf. 482, where the court held, that the assured was entitled to have full repairs made at the port of necessity, and might abandon, if the expense there was greater than half the value of the vessel, although the captain had made temporary repairs and was on his way to another port for full repairs.

¹ *Lincoln v. Hope Ins. Co.*, 8 Gray, 22.

² In *Depeyster v. Col. Ins. Co.*, 2 Caines, 85, the vessel's bottom at the time of sailing was a little worm-eaten, but she was a sea-worthy vessel. She was afterwards sold at a port of distress, it being the opinion of the surveyors, that it would have cost more than the vessel was worth to repair her. At the trial before the jury, the judge charged, "that if, in calculating the repairs, they believed any were necessary on account of injuries received from worms prior to the ves-

sel's sailing, the expense of such repairs should not be included in the estimate." This direction was held to be incorrect, and the rule was laid down, that, if repairs were rendered necessary by a peril insured against, they ought to be made, without any other examination of the antecedent state of the vessel, except to determine the fact of her being seaworthy. So held, also, in *Depau v. Ocean Ins. Co.*, 5 Cow. 63. In *Hyde v. Louisiana State Ins. Co.*, 14 Mart. La. 410, the vessel was injured by a collision, and abandoned. The court considered the following facts to have been determined by the testimony: that, at the time of the abandonment, the cost of repairs would have been more than the value of the vessel; that, if she had met with no accident, she might have been run in the state she was in for eighteen months; and that the damage sustained by the collision did not amount to half the value of the vessel. The court held, that the loss was not total, and laid down the rule, that where injury is done to an old vessel, and she cannot be repaired in such a manner as to be used as before the accident, but at an expense exceeding one half the value, or, in other words, where the injury which the insurers are obliged to make good is the cause of the decaying parts requiring repairs, then the insured may abandon. But if repairs may be put upon her, so that she will be in *statu quo*, though not in a seaworthy condition, at an expense not exceeding one half the value, then the loss is not total. This seems to be the intent

insured is entitled to have the damage done by the peril insured against completely and thoroughly repaired and it is not enough ; to prevent the insured from abandoning, that the vessel could be rendered sea-worthy at an expense less than fifty per cent.¹ If the value of the ship may be affected by its place of building or national character, these circumstances are to be considered in determining whether the loss is partial or total ; and her actual value, under the influence of these circumstances, is to be taken as the foundation of the estimate.²

If the repairs cost less than fifty per cent, and the ship be bottomed to raise the money to pay for them, and sold under the bottomry bond, it would seem that this would be a total loss (all things being done in good faith and for good reason), unless the ship came within the reach of the owner, so as to give him an opportunity of discharging the bottomry bond ; for then the vessel is lost by his own act or neglect.³ If the insurers

of the language of Mr. Justice *Story*, in *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, 77. See also *Cazalet v. St. Barbe*, 1 T. R. 187, where the jury found that the expense of repairs would amount to £48 per cent, but that the ship was not worth repairing, and the court held that the plaintiff was not entitled to recover.

¹ *Lincoln v. Hope Ins. Co.*, 8 Gray, 22.

² *Young v. Turing*, 2 Man. & G. 593, 2 Scott, N. R. 752. In this case, a Dutch ship was stranded on the coast of England. It was shown that had she been a British ship, it would have been prudent to repair her ; but, not being one, her value in England, when repaired, would have been less than the cost of repairs, and in Holland, owing to the peculiar usages of trade in that country, the result would have been the same. Held, the jury should take these facts into consideration, in determining whether the loss was total or not.

³ We have seen, *ante*, p. 127, n. 2, that

if, without fault of the owner, funds cannot be obtained to repair a vessel, an abandonment may be made, although the vessel may not be injured to the extent of fifty per cent of her value. From analogy, the same may be true where the vessel is sold under a bottomry bond, the owner being in no fault whatever ; but this case can seldom arise (except where the assured can only procure the funds on a bond payable at some port out of the course of the voyage), for the bottomry bond cannot generally be enforced until the vessel arrives at her port of destination, where it is the duty of the owner to provide funds ; for it is well settled, that, if the sale is caused by the fault or neglect of the owner in paying the bond, the underwriters are not liable. *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378. See also *Depau v. Ocean Ins. Co.*, 5 Cow. 63 ; *Humphreys v. Union Ins. Co.*, 3 Mason, 429. So held, also, where the vessel was sold to pay salvage. See *post*, p. 151, n. 1.

are notified of the bottomry bond, and requested to discharge it, their refusal or neglect to do so has been supposed to give the assured the right to let the ship go and claim for a total loss; but such a conclusion would create an obligation out of the insurers' conduct which the common principles, either of contracts generally or of insurance, would not seem to justify; for, even if the insurers were bound to discharge this bond, they should be answerable only for the necessary or direct and immediate consequences of not doing so.¹ But insurers are liable for the marine interest paid on bottomry or hypothecation, where the same was properly made.²

If, at the time the abandonment is made, the master has commenced to repair the vessel, the abandonment is invalid, and the assured can only recover for the expense incurred, although it exceeds half the value of the vessel.³ The authorities are, however, conflicting as to whether the insurer has the right, in case

¹ This question was much discussed in the case of *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, and was held, that the underwriters were not bound, in case of a partial loss, and money taken upon bottomry, to pay the bond, and that they were, therefore, not liable for the consequences for their neglect so to do. But if the underwriters order the repairs, for the payment of which a bottomry bond is given, and they then refuse to pay the bond, and the ship is sold, they are liable for all damage which accrues to the owner in consequence of such refusal. *Da Costa v. Newnham*, 2 T. R. 407.

² In *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 405, per *Story, J.* But if, after a sale of the vessel, which the underwriters have refused to ratify by accepting the vessel, a bond being given, they are not liable for the maritime interest. *Jumel v. Marine Ins. Co.*, 7 Johns. 412.

³ This proceeds on the ground that the state of facts existing at the time of

the abandonment determines the right of the assured to abandon. *Humphreys v. Union Ins. Co.*, 3 Mason, 429; *Dickey v. American Ins. Co.*, 3 Wend. 658; *Dickey v. New York Ins. Co.*, 4 Cow. 222; *Depau v. Ocean Ins. Co.*, 5 Cow. 63. In *Ritchie v. United States Ins. Co.*, 5 S. & R. 501, the vessel and cargo were insured on a voyage from Philadelphia to Corunna. At a port of distress, the vessel was repaired, and the whole cargo sold to pay for the expense thereof. After the repairs were begun, but before the cargo was sold, an abandonment was made. The assurers paid for the cargo, and the court held, that, as the cargo had paid for the repairs, and the defendants had paid for the cargo, it was the same as if they had paid for the repairs in the first instance.

In *Saurez v. Sun Mutual Ins. Co.*, 2 Sandf. 482, it was held, that, if the repairs are made merely to carry the vessel from one port to another, in order to make full repairs at the latter port, the right to abandon is gone.

of loss, to offer to repair the vessel, and thus to escape liability for more than the actual cost.¹ This question depends in a great

¹ In *Ritchie v. United States Ins. Co.*, 5 S. & R. 501, the court said: "If the insurer will undertake to repair the damage, though exceeding one half the value, he may do it, and the assured shall not abandon, because, if his ship be repaired, it is all he has a right to demand, and the more or less cost is immaterial to him." This dictum is founded on the case of *Hart v. Delaware Ins. Co.*, 2 Wash. C. C. 346, where Mr. Justice *Washington* instructed the jury that "the insured had a right to abandon, unless the underwriters would agree, at all events, to pay for the repairs, although they should exceed what the underwriters would have been answerable for, if only a partial loss happened." These remarks must, however, be confined to the case then before the court, which arose on the fact that the agent of the assured requested the agent of the underwriters to repair the vessel, and he refused to pay for more than a partial loss, whereupon an abandonment was made. The ruling, then, seems to be, that, if the assured is willing to waive an abandonment, on condition that the underwriter will pay the expenses of repair, the latter must agree to perform the condition, or he cannot have the advantage of it. In *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, 62, Mr. Justice *Story*, after citing the above cases, said: "I know of no judgment where it has been held, that, in a case of capture, embargo, or blockade, the right of the insured to abandon can be intercepted by an offer of the underwriters to indemnify and pay all the expenses. And, indeed, if it could be by such an offer, then an abandonment in all such cases would be perfectly nugatory, for

the policy always imports, on the part of the underwriters, an agreement to this effect. And yet, if the principle be correct, I do not perceive why it is not equally as applicable to a case of capture as of sea damage, to a case of blockade as of shipwreck. It is said, indeed, that the contract of insurance is a contract of indemnity only; and therefore, if the underwriters will bear all the expenses, there is no ground to claim more; and, if all the expenses are paid, the insured is completely indemnified. This is true in a general sense, *sub modo*, but not universally. The insured, by the same law, has a right of abandonment, and this right is the result of the construction of the same contract, which is called an indemnity. . . . It appears to me, meaning to speak with all deference for other judgments, to be introducing a new element of discord into the law of insurance, to allow the right of abandonment to be a shifting right, dependent upon the will of both of the parties, and to be defeated by any act of one, after it has rightfully attached by the act of the other. And I am yet to learn how it is, that an offer, made at the time of abandonment, to pay all expenses, can have more efficacy than the same offer, incorporated as it is in the original terms of the policy." See also *Dickey v. American Ins. Co.*, 3 Wend. 658. The language of *Parsons, C. J.*, in *Wood v. Lincoln & Kennebec Ins. Co.*, 6 Mass. 479, 484, which has been much relied on in support of the view that the underwriter may offer to repair, and thus prevent an abandonment, is as follows: "Where the stranding is under such circumstances that the attempt to recover and repair the ship, in

measure upon the one which we are about to consider, namely, whether, after an abandonment has been made, the underwriters may take the vessel and repair her, and tender her back to the insured, provided the cost of repairs does not exceed half the value.¹ If such a right exists, it is manifest that they can

a reasonable time, for the prosecution of the voyage, may be hazardous, but not hopeless; if the underwriter will engage to pay all the expenses, whatever may be the event, the owner cannot abandon, unless he has used such reasonable endeavors to recover his ship, and has eventually failed. And, *a fortiori*, if the underwriter will himself undertake, at his own expense, for the owner, the recovery of his ship, and shall succeed, and offer to restore her to him, so that he may seasonably prosecute his voyage, the owner cannot abandon, for neither the ship nor the voyage is lost." Mr. Justice Story, in the above case of *Peele v. Merchants' Ins. Co.*, dissents from this doctrine, unless it means, that, in a doubtful case, where the expense of repairs must be great, though not with certainty one half; or where, by the stranding and delay consequent thereon, the voyage may be, but not in all probability must be lost, the owner cannot abandon, if the underwriter offers to repair; he says: "There seems much reason for admitting such an offer as a material ingredient in considering whether the owner has a right to abandon."

¹ We shall see hereafter, that, if the insurer accepts the abandonment, he cannot afterwards say that the loss was merely a partial one. It is also settled that, if he refuses to accept, and afterwards does some act inconsistent with a want of ownership, he is to be treated as having accepted. Does, then, the act of repairing preclude him from setting up his refusal to accept the abandonment? It is so held, in *Cincinnati Ins.*

Co. v. Bakewell, 4 B. Mon. 541. See also *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342, 369. In *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, the vessel ran ashore, bilged, and was in a very hazardous position, so that slight hopes were entertained of her being got off. An abandonment was made, the vessel was afterwards got off by the underwriters, and repaired at an expense less than half her value, and tendered back. It was held, that the plaintiff was entitled to recover as for a total loss. In a suit in the State court, against another underwriter on the same vessel, the court inclined to the opinion that the underwriter had a right to repair the vessel, if he could do so at an expense less than half the value. See also *Wood v. Lincoln & Kennebec Ins. Co.*, 6 Mass. 479.

The Boston policies contain a clause which provides "that the acts of the assured or insurers in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment." *Putnam, J.*, in *Commonwealth Ins. Co. v. Chase*, 20 Pick. 142, 147, said: "The legal construction would have been according to this express provision." And it is now the settled law in Massachusetts that the assured cannot claim a total loss if his vessel is tendered back to him within a reasonable time. See *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191, 1 Met. 160. The question came before Mr. Justice Curtis in a recent case, *Gloucester Ins. Co. v. Younger*, 2 Curtis, C. C. 322. The policy contained the above

repair before an abandonment, although they may have the right before, but not after such act.¹ If the insurer repairs, it seems that he must do it in a reasonable time,² and he must

clause. The insurers contended that the contract was made and was to be executed in the State of Massachusetts, and that it was therefore to be governed by the law of that State. But *Curtis, J.*, held that the question was not one "of mere local municipal law," but arose under the law-merchant, and that the interpretation of this branch of the law-merchant, as set forth in *Peele v. Merchants' Ins. Co.*, was the true one. And the clause above was interpreted, "to have no reference to any other repairs than such as may be needful for the temporary preservation of the property, and its relief from perils within the policy." "And such," adds the learned judge, "I understand to have been the view taken of it in *Reynolds v. Ocean Ins. Co.*, 1 Met. 160." The same is stated by Mr. Justice *Sprague* on page 331, and in 1 *Sprague*, 242, in the same case, *nom. Younger v. Gloucester Ins. Co.* We shall in the next note but one consider the case of *Reynolds v. Ocean Ins. Co.*, and see how far it sustains such an interpretation of the clause in question.

There is a still later decision on this subject in the Court of Chancery, *Mobile, Ala., Marine Dock & Mut. Ins. Co. v. Goodman*, 4 Am. Law Register, 481, where the Massachusetts doctrine is followed in preference to that of Mr. Justice *Story*. The objections of the latter to this doctrine are answered as follows: "It is asked in *Peele v. Merchants' Ins. Co.*, 'At whose risk would the ship be during the repairs?' I reply, at the risk of him to whom it should be determined by the suit that the vessel belonged. It is further asked,

'Could the owner sell her so as to oust the right of the underwriter to repair, or must he sell her *cum onere*?' I reply, that a sale by the assured would be a waiver of his claim for a total loss. It is further said, 'Suppose an attachment on the property,' and to that supposition I say that a court of equity would enjoin."

¹ *Columbian Ins. Co. v. Ashby*, 4 Pet. 139. In this case, after an abandonment had been made, but before any answer had been received, one who professed to act as the agent of the company offered to supply the money necessary to get the vessel off. The court held, that "the assured could not be required to waive an abandonment which, from anything that he knew, might at that time have been accepted."

² It was so held in *Peele v. Suffolk Ins. Co.*, 7 Pick. 254. In *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191, the court held, "that the jury were rightly instructed, that if the vessel was not got off, repaired, and ready, and offered to be restored, within a reasonable time after the underwriters had taken possession of the vessel for that purpose, they must be considered as having made her their own, and accepted the abandonment, and would then be liable as for a total loss." On a new trial, it appeared that the vessel had been voluntarily stranded for the preservation of all concerned, and had been got off and repaired by the defendant's agent, and afterwards tendered to the plaintiffs. It was admitted that the repairs were made with due diligence, but not that she was got off within a reasonable

tender back the vessel in as good condition as she was in before the accident, or supply or pay for any deficiencies;¹ and it has

time. The defendants contended "that until the repairs were begun, they were not bound to use diligence and despatch, and therefore that if they were not duly diligent and prompt in removing the brig from the beach and carrying her to a place of safety, yet this did not evince nor amount to an acceptance of the abandonment"; but the court instructed the jury, that if the defendants, after the abandonment and refusal to accept it, took possession and control of the brig, with the intention of getting her off, repairing, and restoring her to the assured, they were from the time when they took possession for such purpose bound to use reasonable diligence as well in getting her off as in making repairs after her arrival. This instruction was held to be correct. 1 Met. 160. It was argued that the clause in the policy providing that "the acts of the assured or assurers in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment," was an agreement that whether the acts were done tardily or negligently could make no difference, and that, whatever might be the character of the acts, they were protected by the policy from being regarded as evidence of an acceptance of the abandonment. *Shaw, C. J.*, said: "Supposing this view to be correct, still taking possession of the vessel, for another and distinct purpose, is not within this provision in the policy. The act is qualified by the intent and purpose with which it is done. If done solely with a view to save the property, the underwriters were at liberty to do such acts or not, as they should see fit, and to do

them in their own time. If done with an intent to repair and restore the vessel, then it was to be done with reasonable diligence and despatch." The purport of this decision, as we understand it, is, that the clause in question has nothing to do with the right of the insured to enter for the purpose of repairing. It is a matter of historical knowledge that the clause was inserted in the Boston policies after the decision of Mr. Justice *Story* in the case of *Peele v. Merchants' Ins. Co.*, *supra*, and it was intended to secure to the underwriters the rights which the law, as then interpreted by the Supreme Court of Massachusetts, gave them. For what purpose, it may be asked, would the underwriters wish to have the right to "save" the vessel, except that they might "restore" it? That the clause could not have been intended to give the right to make temporary repairs merely, we think is evident from the fact that it was to be done after an abandonment had been made. In *Marine Dock & Mut. Ins. Co. v. Goodman*, 4 Am. Law Register, 481, 495, *Keyes, Ch.*, said: "I may add here, that the qualification of the doctrine asserted in *Reynolds v. Ocean Ins. Co.*, that the underwriter must repair and tender the vessel within a reasonable time, seems to be unwarranted by the principle upon which the underwriter takes possession and repairs. It is admitted that the loss in the case is not an actual total one, and the inquiry alone that remains on this branch of the cause is, whether the loss amounts to a technical total loss."

¹ In *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191, 197, the law is stated by

been held that if, in repairing, expenses are necessarily incurred by the underwriters for which they would not have been liable in an action on the policy, they may recover the amount of them from the assured.¹

There may, perhaps, be a total loss by the sale of the ship by the master.² His power and duty in this respect have been

Shaw, C. J., as follows: "If the underwriters, after having refused to accept the abandonment, took possession of the vessel for the actual and declared purpose of getting her off, repairing, and restoring her to the assured, and in good faith intended and with reasonable diligence proceeded to make full and complete repairs, and in good faith, according to their intent, did make what they considered and believed to be a substantial repair and restoration of the vessel to as good a condition as she was in before, and in this state tendered her to her owners, it was a substantial performance of their contract, and the assured were bound to accept her; that if, at the time of such tender, the assured made no objection to the sufficiency or completeness of the repairs, nor pointed out any deficiency, the tender should be deemed good, although it might be discovered afterwards that there were deficiencies in the repairs. And inasmuch as it may happen that, after what may be deemed and what may seem to one or both parties to be a complete repair, some deficiencies may appear, the court are of opinion that the acceptance of the vessel by the assured would not preclude them from claiming any further loss or damage which might be discovered, but according to the principles of the contract, securing to the assured an indemnity, an action might be maintained, after such acceptance, to recover for any such deficiency, or unrepaired damage, as a partial loss."

¹ *Commonwealth Ins. Co. v. Chase*,

20 Pick. 142. The policy in this case contained a clause exempting the underwriters from general-average charges and partial loss, unless the sum of such loss, which insurers would be obliged to pay under an adjustment as of a partial loss, should amount to fifty per cent. The underwriters repaired the vessel, and the court held they were entitled to recover the amount paid for getting the vessel off a beach, and repairing her, and the agent's expenses. See also *Marine Dock & Mut. Ins. Co. v. Goodman*, 4 Am. Law Register, 481, 499.

² The question whether a sale is justifiable or not is chiefly important in this connection in determining whether the underwriters, in case of a total loss, are obliged to take the proceeds of the sale as salvage, or whether they may demand the vessel from the vendee. In some cases, however, it appears to be held that a sale made through necessity constitutes a loss *per se*. Such is evidently considered to be the law in England, as is shown by the authorities cited, *ante*, p. 121, n. 1. And the same doctrine is asserted in some cases in this country. *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 249; *Mutual Safety Ins. Co. v. Cohen*, 3 Gill, 459; *Fuller v. Kennebec Mut. Ins. Co.*, 31 Maine, 325. But the better opinion now is, that unless the facts of the case show a total loss independently of the sale, such sale does not make one. *Howell v. Philadelphia Mut. Ins. Co.*, U. S. C. C., Maryland, 25 Hunt's Merch. Mag. 80;

already somewhat considered. Here it need only be remarked, that he has the power to sell only from necessity, and the sale is valid therefore when made from an actual and stringent necessity;¹ but this necessity must be judged of from the facts and probabilities existing at the time and apparent to the master, and not by the result.² Nor is the master at liberty to sell without notice to, or the advice of, the owners, provided he be so near them that he can delay the sale for this purpose without endangering a greater loss.³ And if he cannot thus communicate with the owners, but knows that the ship is insured, and can communicate with the insurers, we should say he is bound to do so.⁴

If, in a port where the insured should have funds, the master sells the vessel to prevent a forced sale by process of law to pay off workmen who have a lien on the vessel, the insured cannot abandon, because the loss was caused by his neglect.⁵ And the master cannot sell if the vessel might be repaired but for the negligence of the resident agents of the owner.⁶ And if the master is part owner, he has no greater power to sell, so as to affect insurers, than if he was the master only.⁷

If the master sells, he cannot buy; and if the port warden, *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456, 466; *Hall v. Ocean Ins. Co.*, 21 Pick. 472, 482; *Greely v. Tremont Ins. Co.*, 9 Cush. 415, 422.

¹ *The Fanny & Elmira*, Edw. Adm. 117; *Hunter v. Parker*, 7 M. & W. 322; *Prince v. Ocean Ins. Co.*, 40 Maine, 481, in which, after a thorough review of all the authorities, the court held that the jury were rightly instructed when they were told that the sale would be justified if there was an apparent necessity for it, and that no qualification to intensify the word "necessity" was necessary. *Shepley, C. J.*, in this case, p. 492, speaking of the power of the master, said: "He is under a moral obligation to pursue that course and make that decision which will best promote the interests of all for whom he has become the agent. He must do wrong if he does not do so. He has no alternative left, and must

sell, if in the faithful discharge of that duty he determines that the calamity will be most alleviated and the interests of all be best served by a sale. A moral necessity for a sale can mean no more." See also *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55.

² See *Prince v. Ocean Ins. Co.*, 40 Maine, 481; *The Brig Sarah Ann*, 2 Sumn. 206.

³ See *Pike v. Balch*, 88 Me. 302; *Scull v. Bridle*, 2 Wash. C. C. 150; *Robinson v. Georges Ins. Co.*, 17 Maine, 131.

⁴ See *Hall v. Ocean Ins. Co.*, 9 Pick. 466; *Stephenson v. Pacific Ins. Co.*, 7 Allen, 232.

⁵ *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342, 368.

⁶ *Tanner v. Bennett, Ryan & M.* 182.

⁷ *Prince v. Ocean Ins. Co.*, 40 Maine, 481.

surveyor, or any person authorizing or officially promoting the sale should buy, it would be a most suspicious circumstance, although not sufficient, of itself, to avoid the sale.¹

It is frequently said that, in determining whether the master should have repaired the vessel, instead of selling her, or should have forwarded the cargo instead of breaking up the adventure at the intermediate port, regard should be had to the question whether a prudent owner, had he been present and uninsured, would have acted as the master did.² We have already said, that this language is to be regretted. Nothing is more certain or more obvious, than that the rule that a sale by the master is justified only by "a stringent necessity," and the rule that "a sale by the master is justified if a prudent owner, under the same circumstances, would have made it," are not only two rules, but two very different rules. If a prudent selection from alternatives be not the same thing as an adoption of a course which is forced upon

¹ The general rule is, that a vendor cannot become a vendee, and that a sale in such a case is void, and the parties have no greater privileges than before the sale. *Church v. Marine Ins. Co.*, 1 Mason, 341; *Barker v. Marine Ins. Co.*, 2 Mason, 369. In *Hall v. Franklin Ins. Co.*, 9 Pick. 466, the question arose whether a sale at which one of the owners, but not the plaintiff, became the purchaser, was valid. The jury were instructed that the purchase by him could not affect the right of the other owners to recover. When the case came before the full bench, the sale was held invalid on other grounds, and this question was not decided. See also *post*, § 9.

² Thus in *Fleming v. Smith*, 1 H. L. Ca. 513, 534, Lord Campbell, C. J., said: "If a prudent person uninsured would not have repaired the vessel, but would have sold it to be broken up, that amounts to a total loss." And in *Irving v. Manning*, 1 H. L. Ca. 287, 304, *Patteson*, J., said that, in considering

whether the vessel should have been repaired, "the course has been in all modern times to consider the loss as total, where a prudent owner uninsured would not have repaired." See also *Poole v. Protection Ins. Co.*, 14 Conn., 47, 58; *Prince v. Ocean Ins. Co.*, 40 Maine, 481. In *Domett v. Young*, Car. & M. 465, *Gurney*, B., charged the jury as follows: "The main question in this case is, whether the loss was a total loss or a partial loss; and in determining that question you will have to consider whether the owners of the ship, as prudent men, and exercising a sound judgment, would, if they had been uninsured, have sold the vessel, or whether they would have employed persons to try and get her off, and, if successful, have repaired the vessel for themselves." See also *Young v. Turing*, 2 Man. & G. 593, 2 Scott, N. R. 752; *Roux v. Salvador*, 3 Bing. N. C. 266, per Lord Abinger, C. J.; *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342, 363.

one, or if choice be not the same thing as compulsion, then both of these rules cannot be held applicable. One must be selected and enforced; and that should be the rule of necessity. The most that can be done with the other is to use it by way of illustration; and to use it so carefully that it shall not itself seem to be the rule. Indeed it seems to be used with this caution in cases of the highest authority. And as the sale by the master is not valid, unless it is not only the result of necessity, but is also made in entire good faith, the inquiry whether a prudent owner, then and there present, would have done as the master did, may aid the jury in determining whether this good faith had been perfectly preserved.¹

¹ Thus in *Winn v. Columbian Ins. Co.*, 12 Pick. 279, the jury were instructed that in regard to the sale much would depend upon the fact whether an owner uninsured would have acted as the master did. The jury having found a verdict for a partial loss, the plaintiff moved for a new trial on account of misdirections of the court, on the ground that as the power of an owner and that of a master were different in respect to a vessel, the one having the absolute control and the other being but an agent with no power to subject the property to unusual or extraordinary perils, the way an owner would act was no test as to the duty of the master. *Shaw, C. J.*, in delivering the opinion of the court, said: "There are undoubtedly points of difference between the condition and powers of a master and those of an owner. But it does not appear to the court that it was intended to suggest to the jury that the parallel was complete in all particulars. It is the well-known rule on this subject, that to warrant a sale it must be made to appear to the satisfaction of the jury, not only that there was an actually existing, inevitable necessity for breaking up the voyage and abandoning the ship, but that in determining upon that measure the master acted with competent skill and judgment, with

due care, diligence, and attention, and with strict fidelity. In testing the conduct of the master in these particulars, it seems to the court not an unfit illustration, to inquire how an owner, interested to the amount of the property, would act under like circumstances. It is at least a test of the honesty and sincerity, the zeal and perseverance, with which he acts for the benefit of those concerned in the preservation of the property under his charge, and with this view it appears to us to have been used." In *Stephenson v. Pacific Ins. Co.*, 7 Allen, 232, the court said: "Something more than good faith was required of the master. He was bound to act with good judgment and discretion, as a prudent owner under like circumstances would have acted." And in *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 621, the jury were instructed that if it was absolutely necessary, and for the interest of all concerned, that the vessel should be sold, and if a prudent and discreet owner, placed in like circumstances, would have come to the same conclusion and sold the vessel, and if from all the circumstances of the case the sale was justifiable, the defendants were liable. The court held that "the professional skill, the due and proper diligence of the master, his opinion of the neces-

Whether the insured or the insurers are answerable for a mistake of the master, either in selling without necessity, or in the city and the benefit that would result from the sale to all concerned, would not justify it, unless the circumstances under which the vessel was placed rendered the sale necessary in the opinion of the jury." But in *Robinson v. Commonwealth Ins. Co.*, 3 Sumner, 220, 227, Mr. Justice Story seems to have confounded the necessity and the good faith, and to have allowed in proof of the necessity what should have been only evidence of good faith. The insurance was on memorandum articles. The vessel was sold at an intermediate port, and one question was whether the master was justified in selling her, instead of repairing her and prosecuting the voyage. Speaking of the moral necessity which would authorize the master to sell, Story, J., said: "In short, I know not how better to put the case of such a moral necessity than to say, that it is such an act of sale as under like circumstances a considerate owner who was uninsured would adopt for his own true interest and that of all concerned in the voyage."

The remarks of *Walworth*, Ch., in *American Ins. Co. v. Ogden*, 20 Wend. 287, 302, on this subject are replete with sound sense and reason: "The principle of submitting it to a jury in each case to decide what a prudent owner would do, for the purpose of determining the right of the assured to abandon, would necessarily lead to ruinous litigation, and would deprive both the insurers and the assured of all the benefits intended to be secured to them by the adoption of the rule as to the extent of the repairs exceeding half the value of the vessel. It appears to me to be wholly inconsistent with reason and justice to permit both rules to stand together. The question as to what a prudent owner would do may be a very proper rule of decision in a case of stranding, and before it is known whether a vessel can be gotten off, or what injury she has sustained or may sustain in her then situation; and the other rule cannot be applied to such a case. But the adoption of such a principle in other cases, where the vessel is safely moored in a regular port, would probably have the effect here, as it has already had in England, of compelling underwriters to insert a stipulation in the policy that there shall be no abandonment except in case of capture or detention, or where the vessel is stranded." In *Moss v. Smith*, 9 C. B. 94, the freight of the vessel was insured on a certain voyage, and at an intermediate port the vessel, having been damaged, was sold. The expense of repairs would not have been equal to the value of the vessel when repaired, but would have exceeded the value of the freight. It was held, under these circumstances, that the owner was bound to repair the vessel and earn the freight. It was contended that if a prudent owner, looking at the amount of freight, would not have repaired the vessel, there was a total loss of freight. But this doctrine was controverted, and *Maule*, J., said: "The ordinary measure of prudence which the courts have adopted is this, if the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss." See also *Rosetto v. Gurney*, 11 C. B. 176, 7 Eng. L. & Eq. 461, 466. So, in *Reimer v. Ringrose*, 6 Exch. 263, 4 Eng. L. & Eq. 388, where corn, which was insured free

mode or terms of sale, must depend principally on the fact whether the master was the agent of the owner of the property insured, or of the underwriter, at the time of the sale. The insurers are not to be made liable for or by his acts, unless he has acted within his duty, authority, and discretion, whether these belong to him as master, or are created and conferred by extraordinary circumstances. And the question of a sufficient necessity is a question for the jury, under the direction of the court.

We shall consider hereafter the effect of the purchase by the master of the vessel, when sold, on the right of abandonment of the owners.¹

The report of the surveyors is a document of much weight and importance, but is not conclusive as evidence.² The decree of a court of admiralty is, in general, conclusive, although open to some inquiries as to fraud and the like.³ But if a vessel is ordered to be sold under such a decree to pay salvage, and the owner has an opportunity to pay the salvage and discharge the

from average, was sold at an intermediate port on account of being damaged, *Alderson, B.*, said: "But there was another point made at *nisi prius*, and which was whether or not it was a total loss in case a party uninsured would have conducted himself as a reasonable man in the way in which the plaintiff had conducted himself; that is to say, instead of bringing home the corn in a damaged state, and putting himself to expense in so doing, selling it and receiving the money. Now I, at that time, was of the opinion, and am so still, and I believe the court entirely concur with me, that that was not a proper view of the case to be left to the jury at all, but that the real question to be left to the jury would have been, whether or not the corn was in that state that, if brought home, it could have been sold for an amount exceeding the expense of bringing it home." And in *Navone v. Haddon*, 9 C. B. 30, where goods insured free from average

were sold at an intermediate port, and the jury found that a prudent uninsured owner would have adopted this course, it was held that as they could, at a reasonable expense, have been put in a condition to be brought home by another vessel, the underwriters were not liable. *Maule, J.*, said: "A partial loss cannot be turned into a total loss because those who have the control over the goods may act prudently in selling them at an intermediate port, rather than incur the expense of cleansing and reshipping them. It may be that a prudent owner, uninsured, would not have thought it worth his while to carry these goods farther, but would have left them behind; still that alone would not make the loss total."

¹ See *post*, § 9, on Revocation of Abandonment.

² *Gordon v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 249, 264; *Prince v. Ocean Ins. Co.*, 40 Maine, 481.

³ See *post*, ch. on Action.

lien, he is so far bound to do this, that, if he does not, the sale will be regarded as made by him voluntarily, and as not giving a claim for a total loss.¹ And if a ship be sold under a decree of condemnation as prize, and the owner buys it, or adopts a purchase of it by the master, the vessel is considered as not having passed away from him, but the price he pays, with costs and charges, is the measure of his loss;² and so it would be in a case of compromise with captors, or ransom from them.³

SECTION IV.—*Of Abandonment of the Cargo.*

GOODS are totally lost if destroyed by a peril insured against; or if injured to such an extent and in such way as to make them of little or no value for the purpose for which they were intended; or if the voyage upon which the insurance on the goods is made is entirely broken up.⁴ But if the voyage is broken up, merely for the season, as where the vessel at an intermediate port requires extensive repairs,⁵ or where the ship is lost, but the goods are saved, and a delay of months ensues, while waiting for means of forwarding them, the insured cannot abandon.⁶

¹ *Thorneley v. Hebson*, 2 B. & Ald. 513. But, generally, if the vessel is sold to pay salvage, the loss is total. *Williams v. Suffolk Ins. Co.*, 3 Sumner, 510. And as salvage expenses are to be computed in making up a total loss, *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 400, it follows that, if they amounted to more than half the value of the vessel, the assured would not be obliged to pay the salvage to prevent the sale, but might abandon and claim a total loss. See *Holdsworth v. Wise*, 7 B. & C. 794.

² See *post*, § 9.

³ See *post*, § 9.

⁴ In *Manning v. Newnham*, 3 Doug. 130, the ship was sold on account of sea damage at an intermediate port, and the cargo, which was but little injured, was also sold, there being no ship there

to bring it on. Held, that the assured could abandon as for a total loss. This doctrine was assented to, but the point was not decided in *Wilson v. Royal Exch. Ass. Co.*, 2 Campb. 623, 625, per Lord *Ellenborough*, C. J.

⁵ *Anderson v. Wallis*, 2 M. & S. 240. See also *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342, 365.

⁶ *Hunt v. Royal Exch. Ass. Co.*, 5 M. & S. 47. The case of *Hudson v. Harrison*, 3 Brod. & B. 97, which is sometimes cited as adverse to the doctrine of the text, was decided expressly on the ground, that the underwriters had by their acts accepted the abandonment, before the goods could have been forwarded. In *Dixon v. Reid*, 5 B. & Ald. 597, the ship and cargo were bartrously taken out of the course by the crew, and the ship and a part of her

The fifty-per-cent rule applies to the cargo, as well and in the same way as to the ship.¹ But in respect to the cargo, as in respect to the ship, if there be a loss not actually total, but one which might be made constructively total, whatever remaining interest or property, or claim on account of the subject-matter of insurance, the owner may have, must be transferred by him by abandonment to the insurers. And a general abandonment has here also, as in respect to the ship, the full effect of a universal transfer and cession.

As there may be a total loss of the cargo, but not of the ship, so there may be a total loss of the ship, and not of the cargo. For if the vessel is wrecked, or otherwise taken from the possession of the master, and it is in his power to take the cargo from the ship and send it forward to the place to which it was originally shipped, it is his duty to do so. The power and duty of the master in this respect, and the rights and obligations of the

cargo sold, and the rest sent on in another vessel. The loss was held to be total. *Abbott, C. J.*, said: "The case is plainly distinguishable from all the cases which have been cited in argument, where the ship has been driven out of her course by the perils of the sea, and the voyage thereby retarded. In those cases, the cargo was, during the whole time, in the possession of the assured. Here, by the fraud and barratry of the master and mariners, the cargo was taken out of the possession of the assured. From that time it became to them a total loss." The distinction taken in this case, between the forwarding of the cargo by the master and by an unauthorized person, does not appear to be founded on correct principles. All that the insurer warrants is, that the cargo shall arrive at the port of destination uninjured by the perils of the sea. He does not warrant that any particular person shall bring it on, but merely that it shall arrive.

¹ *Gardiner v. Smith*, 1 Johns. Ca. 141; *Gilfert v. Hallet*, 2 Johns. Ca.

296. In *Moses v. Col. Ins. Co.*, 6 Johns. 219, insurance was effected on three hundred barrels of flour from New York to London. On the way, one hundred and twenty-three were thrown overboard and thirty were sold through necessity, and the rest were sent on and delivered. The value of those sold and those thrown overboard together amounted to more than one half the value of the whole; but, deducting the amount which those sold brought at the sale, the loss did not amount to fifty per cent. The court held, that the plaintiff was entitled to recover. *Van Ness, J.*, said: "The insurer undertook that the whole of the article insured should arrive at the port of destination; and the assured having nothing to do with the money for which the damaged goods were sold. The sale became necessary by reason of an injury to the flour for which the insurers are liable, and the proceeds of the sale passed by the abandonment to the insurers." We are somewhat inclined, however, to doubt this decision.

owner, the shipper, and the master, which depend upon this duty, belong almost equally to the law of shipping and the law of insurance.¹ We have already presented some views of this subject, and shall here repeat briefly only what belongs to it in this connection. The *rights* of the master, in this respect, are well settled, and we cannot but regard it as a singular circumstance that his *duty* or obligation in this respect is not, so far at least as direct adjudication is concerned, more positively settled. Thus, it is certain that the master has a right to carry goods shipped on board to their port of destination, and so earn his full freight.² We consider it equally certain that, if the shipper wishes his goods at an intermediate port, he must pay for them their full freight to the port of destination; and, if he refuses to do this, the master may carry or send them on, and so earn his full freight.³ But while all the authorities agree that the master has the right to send the goods on in any other ship, if his own be lost, and so earn his freight, whether it be his duty to do so, is, on the authorities, uncertain.⁴ We should say, however, that the decided weight of authority in this country leads to the conclusion that this is not only his right, but his duty; or, in other words, that the master is bound thus to transship the cargo, if there be within reach, by reasonable efforts, a vessel or other means of transport, to the port of destination of the cargo.⁵ And we have many

¹ See *Rugely v. Sun Mutual Ins. Co.*, 7 La. Ann. 279.

² *Luke v. Lyde*, 2 Burr. 882, 889; *Jordan v. Warren Ins. Co.*, 1 Story C. C. 342.

³ In *Jordan v. Warren Ins. Co.*, 1 Story C. C. 342, 354, this question is fully considered and clearly settled by Mr. Justice Story.

⁴ Faber (Com. ad Pand.) and Vinnius (Notæ ad Com. Peckii ad Rem Nauticum, 294, 295) were of the opinion that the master was not bound to transship. The Ordinance of the Marine, on the other hand, held it to be the duty of the master to send on the goods if he could. Tit. du Fret. art. 11. Valin (tit. du Fret. art. 11.) and Pothier (Chatepartier, n. 68) hold that the master is under

no such obligation, but loses his freight for the entire voyage by his omission to procure another vessel. Emerigon (tome 1, 428, 429) maintains the opposite, resting himself on the old French code. The new French Code de Commerce, art. 296, provides that the master is obliged, if the vessel becomes disabled, to repair her; during the time of such repairing the shipper is bound to wait, or pay the full freight; and if the vessel cannot be repaired, he *must* hire another; but if he cannot, *pro rata* freight is due. Boulay Paty, Com. de Droit. Com. Mad. tom. 2, 398-405; and Pardessus Com. de Droit. Com. tom. 3, n. 644, agree with Emerigon.

⁵ In this country the decided weight of authority seems to us to justify the asser-

cases indicating the discretion of the master in the matter, and the rules by which he should be governed in the exercise of this discretion.¹ In one of these cases in New York the Supreme Court say, in reference to transshipment: "If there be a vessel in the same port, or a contiguous port, his duty is clear. *The rule is imperative.* But where resort must be had to distant places, and there are further serious impediments in the way of putting the cargo on board, the rule is not obligatory."² In England this question has not as yet been decided; but in an interesting case recently argued in the Exchequer Chamber, Kelley, C. B., giving the opinion of the court, cites from the first edition of our work on Maritime Law, vol. 2, p. 385, the following passage: "There is a total loss of freight when the ship and cargo are totally lost, or the vessel becomes wholly unnavigable, or is subject to a detention of such character as to break up the voyage. It is said, in some cases, that if a loss of the ship be only constructively total, that is, made so by abandonment, the owner may abandon also the freight, and claim as for the total loss of it; but if, although the ship itself be wrecked and utterly lost, the master can reshipe and forward the goods by reasonable endeavor and at reasonable cost, we have seen that it is his duty to do so; and if he neglects this duty, the insurer is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss will be partial or total, according to its amount when so adjusted." The court then cite from *Schieffelin v. N. Y. Ins. Co.*, 9 Johns. 21, referred to, this language of Kent, C. J.: "The point is, whether it be a good defence in any case to an action on a policy for freight, that a ship-owner refused or neglected

tion, that transshipment is not only the right, but the duty of the master. *Saltus v. Ocean Ins. Co.*, 12 Johns. 107; *Schieffelin v. N. Y. Ins. Co.*, 9 Johns. 21; *Searle v. Scovill*, 4 Johns. ch. 218, 222; *Treadwell v. Union Ins. Co.*, 6 Cow. 270; *Bryant v. Com. Ins. Co.*, 6 Pick. 130; *Hugg v. Augusta Ins. & Banking Co.*, 7 How. 559; *Adams v. Haught*, 14 Texas, 243.

¹ *Saltus v. Ocean Ins. Co.*, 12 Johns.

107; *Whitney v. N. Y. Firem. Ins. Co.*, 18 Johns. 208; *Hugg v. Augusta Ins. & Banking Co.*, 7 How. 559; *Williams Kennebec Ins. Co.*, 31 Me. 455; *Ogden v. Gen. Mut. Ins. Co.*, 2 Duer, 204; *Smith v. Martin*, 6 Binn. 262; *Pope v. Nickerson*, 3 Story, C. C. 465; *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131.

² *Treadwell v. Union Ins. Co.*, 6 Cow. 270.

to forward the goods by another vessel when he had it in his power. We have not met with any decided case on this point, but it appears to be reasonable and consistent with the principles of the contract, that the insurer should in such case be discharged." The court then add: "This has never been held to be law in this country, but it must be admitted that it is not unreasonable, that, if the owner of freight insured fails to earn it by any default of his own, he should be disentitled to recover it against the insurer."¹

In the first place, it is the duty of the master to transship the goods, or send them on, even by land carriage, if he can with reasonable endeavors; if he fail to do this and a total loss ensues, this is a loss by the misconduct of the master, and if the insurers have insured against that, they are answerable. But the shippers have a right to look to the owner for compensation for damage sustained by the wrong-doing of the master; and this right or claim passes to the insurers by abandonment.

Generally, if the master could have transshipped the goods, and did not, the shipper cannot abandon as for a total loss.² And if a part only be saved in a condition to be transshipped, or forwarded, whether it will be the duty of the master to do so must depend upon the quantity and value of what is saved, and the facilities for forwarding it, and the probability of its perishing or greatly deteriorating on the way;³ as he would not be bound to discharge this duty where it was of no practical benefit, or would be to the detriment of the parties concerned.

As the goods may be abandoned as for a total loss, if the voyage is broken up, so, if there be many shipments for divers ports, and the ship is prevented, by a peril insured against, from

¹ *Kidston v. The Empire Man. Ins. Co.*, Exch. Chamb., Feb. 4, 1867. Immediately after the extract given in the text, the court say, in p. 6, of Eng. Law Rep. 1867 (which is the only report of the case within our reach), referring to the question whether it is the master's duty as well as right to transship goods: "But it is necessary to decide this point." This is obviously a misprint, for the court do not decide it, but it

is a fair conclusion from their language that the American view of this question is favorably regarded by all the judges.

² See *Wilson v. Royal Exch. Ass. Co.*, 2 Campb. 623; *Ludlow v. Col. Ins. Co.*, 1 Johns. 335; *Hunter v. Prinsep*, 10 East, 378; *Portland Bank v. Stubbs*, 6 Mass. 422; *Welch v. Hicks*, 6 Cow. 504.

³ *Hudson v. Harrison*, 3 Brod. & B. 97.

landing a certain shipment at a certain port, that shipment may be abandoned, although the vessel goes on and reaches the other ports and delivers the cargo in safety.¹

If the vessel is wrecked at a distance from any market, and the goods are taken out and carried to a market and there sold, under circumstances which render the sale valid, the expenses of transporting the goods, and of the sale, are to be deducted from the gross proceeds of the sale to determine whether the loss has exceeded fifty per cent.²

If the goods insured remain in specie, but so injured that they cannot be carried with safety, or with any hope of their arriving in a merchantable condition, to their destined port, it is the duty of the master, as well as his right, to do the best he can with them at any intermediate port. If they are of any value, he should obtain this by a sale, and then the shippers may claim for a total loss, transferring the proceeds by abandonment.³ This rule would apply, whatever be the cause of the injury, as a leak, or submersion, or a sudden shock by striking a shoal or rock, if the peril be insured against. But if the goods perish by natural decay or intrinsic defect, this is, of course, not at the risk of the insurers.⁴

If goods are jettisoned, the shipper may demand contribution from the interests saved by the sacrifice, and then claim the balance; or he may, at his own discretion, demand from the insurers for the whole loss, and transfer to them by abandonment his claims for contribution. If, therefore, the jettison amounts to sixty per cent, he may claim as for a total loss, although he transfers by abandonment a claim for contribution amounting to twenty per cent; but if he claims and receives the twenty per cent from the contributing parties, his loss becomes less than one half, and cannot be made total by abandonment.⁵

Generally, where goods are jettisoned, the claim against the insurers is the same as if they had been lost by the peril from

¹ In *Akin v. Mississippi Marine & F. Ins. Co.*, 16 Mart. La. 661, goods were insured from New Orleans to Key West and Havana. When near Key West, the vessel encountered a gale, in which a considerable part of the cargo was damaged, and the captain thought it necessary to go to Havana, where the cargo was sold. It was held that the

loss was total, because the voyage to Key West had been lost.

² *Kettell v. Alliance Ins. Co.*, 10 Gray, 144.

³ See *Whitney v. N. Y. Firem. Ins. Co.*, 18 Johns. 208.

⁴ See *Boyd v. Dubois*, 3 Campb. 133.

⁵ See *post*, ch. on General Average.

which the jettison saves the remainder. And jettison is usually specifically insured against.¹

If there be a capture, or other detention insured against, and a restoration, there still may be an abandonment thereafter, if the damage by the delay or hindrance works a loss of more than fifty per cent, or breaks up the voyage, but not otherwise.² A capture gives the right of immediate abandonment;³ but any detention which may be rationally expected to last but a short time gives no right to abandon; but if it appears to be permanent, and to amount to a destruction of the voyage, or a taking of the property permanently from the control of the master, it justifies an abandonment.⁴

If the ship be released from capture by a compromise which takes from the insured more than half the value of the property insured, this gives a ground for a constructive total loss.⁵

The rule in case of a sale by the master is the same in relation to the cargo that it is in relation to the ship; the master must not sell unless the sale be strictly necessary; then he may sell; and the owner, being so dispossessed of his property, may abandon it, always provided that the necessity for the sale springs from a peril insured against.⁶ And if an agent of the owners invests the pro-

¹ See *Judah v. Randal*, 2 Caines, Ca. 324; *Lord v. Neptune Ins. Co.*, 10 Gray, 126; and cases cited *post*, ch. on General Average.

² *Dorr v. New Eng. Marine Ins. Co.*, 4 Mass. 221. In this case the vessel and goods were captured and restored. The goods were delivered to a person who represented himself as the agent of the owner, on condition that he should pay a certain proportion of the expenses, and give security to pay the freight to the captain. This was on the 22d of the month. The owner, hearing of the capture, abandoned on the 18th. The former master refused to take the goods on, and they were shipped by the person to whom they had been delivered, on board another vessel on the 28th of the following month, and they finally arrived at the port of destination, where

they were sold and the proceeds held for whom it might concern. The court held, that the plaintiff was entitled to recover as for a total loss.

³ See cases *ante*, vol. 1, pp. 575-589.

⁴ See cases *ante*, vol. 1, pp. 575-589.

⁵ *Vandenheuvel v. United Ins. Co.*, 1 Johns. 406; *Clarkson v. Phoenix Ins. Co.*, 9 Johns. 1. In *Waddell v. Columbian Ins. Co.*, 10 Johns. 61, the compromise was made by the master, who was also a part owner, agreeing to relinquish all claim to the vessel and cargo on payment of a certain sum by the captors. Held, that the compromise being *bona fide* and for the best interest of all concerned, the master could recover on a policy insuring his interest as part owner.

⁶ See *Page v. Western M. & F. Ins. Co.*, 19 La. 49; *Vaughan v. Western*

ceeds of the cargo sold for the purpose of remittance, this does not affect the abandonment.¹ But this right of sale of the cargo does not exist so as to render the underwriters on the cargo liable, if the cargo is sold, not on account of damage done to it by a peril of the sea, but to pay for repairs to the vessel.²

As the master may sell, so he may hypothecate; and if the purpose of the master is to raise funds, and he can hypothecate, he should do so rather than sell, unless the terms demanded would make the transaction certainly injurious to the shipper. And the purchaser at the sale, or the lender upon hypothecation, must use reasonable precautions to satisfy himself that the sale or pledge is necessary; otherwise the transaction is void; but after this care the buyer or lender is not responsible for any use or abuse of the funds by the master.³ Such a loan on hypothecation does not constitute a total loss; because the shipper has his remedy against the owners of the ship.⁴ The question for the insurers, in a case of *respondentia* or hypothecation of the goods or bottomry of the

M. & F. Ins. Co., 19 La. 54; *Caldwell v. Western M. & F. Ins. Co.*, 19 La. 42; *Rugely v. Sun Mut. Ins. Co. of N. Y.*, 7 La. Ann. 279. In *Underwood v. Robertson*, 4 Campb. 138, goods were insured at and from London to Demerara. The ship was captured near the port of destination, plundered of her stores, and the whole crew, except the captain and a boy, taken out. She was afterwards recaptured and carried into St. Thomas, where she was sold by the master under an order of the admiralty court, obtained by him for that purpose. The master testified that he could not procure a crew of any sort to carry the ship from St. Thomas to Demerara, and that, without selling the cargo, he could not pay the salvage. Under these circumstances the insured claimed a right to abandon and recover as for a total loss. Lord *Ellenborough* held, that if the master could not have procured a crew at once, he should have waited a reasonable time for that purpose, and that it did not appear, even if the ship insured

could not have proceeded, but that the goods could have been forwarded in other vessels. In regard to the sale to pay salvage, Lord *Ellenborough* said: "He was bound to have tried, and to have tried seriously and deliberately, every other expedient to raise money before disposing of any part of the goods intrusted to his care. It does not satisfactorily appear that he might not have raised the money by drawing on his owners, or by hypothecating the ship. . . . The sale of the cargo was only to be resorted to in the last extremity, when every other expedient had failed, and every other resource was hopeless." See also *Mistor v. Lord*, 1 Blackford, C. C. 354; and *Butler v. Murray*, 30 N. Y. 88.

¹ *Pacific Ins. Co. v. Catlett*, 4 Wend. 75, 1 Wend. 561; *Catlett v. Pacific Ins. Co.*, 1 Paine, C. C. 594.

² See cases *ante*, vol. 1, p. 622, n. 4.

³ See *ante*, vol. 1, p. 218, n. 3., p. 219, n. 3.

⁴ See *ante*, vol. 1, pp. 208-226.

ship, is, What is the whole amount, of expense and interest, actually lost?¹

If goods hypothecated or pledged on *respondentia* are sold to pay the debt, this may be a total loss, if the shipper had no opportunity to liberate the goods and prevent the sale. But if he had such opportunity and did not profit by it, he cannot, merely by reason of the sale, claim as for a total loss. And if his expense and the amount of his actual loss are increased by his own neglect or fault, the insurers may charge to him all that increase.²

The rule of fifty per cent does not, in our opinion, apply if any substantial part of the goods insured arrives in safety at its destined port. Thus, if, in the course of the voyage, the ship be stranded, and relieved by jettison of eighty per cent of a shipment, and the remaining twenty per cent arrives in safety, there can be no converting of this partial loss into a total loss by abandonment, whether the contribution due would amount to more than thirty per cent or less. Nor can a loss of a part of the goods at the port of destination be made a constructive total loss by abandonment, however large that part may be.³

¹ Fontaine v. Columbian Ins. Co., 9 Johns. 29.

² The same rule would probably be adopted here as in the case of a bottomry bond, where it is held that the underwriters are not bound to furnish money to take up the bond, and are not therefore liable if the ship is sold through the neglect of the owners to pay the same. Bradlie v. Maryland Ins. Co., 12 Pet. 378.

³ This question arose from the loss of property on board the Paul Jones. This loss was very great, and it involved many questions and many parties in Boston and in New York; and all of the questions were referred, by nearly all the parties, to Professor Greenleaf of the Cambridge Law School, the Hon. Franklin Dexter, of Boston, and the author of this work. The case was thoroughly argued in writing by able counsel, and the referees came unanimously to the conclusion ex-

pressed in the text, and were sustained on this point by the case of Forbes v. Manufacturers' Ins. Co., 1 Gray, 371. Dewey, J., said: "The court are of opinion, that after any considerable portion of the goods insured—as in the present instance thirty-eight per cent of the whole amount of the number of boxes of teas—has arrived at the port of destination, and been landed in a perfect state, the assured cannot then abandon and recover for a total loss upon the ground of the loss of more than fifty per cent at some former period of the voyage." See also Seton v. Delaware Ins. Co., 2 Wash. C. C. 175. But no notice appears to have been taken of this rule in the case of Moses v. Columbian Ins. Co., 6 Johns. 219, cited *ante*, p. 152, n. 1. The case in 1 Gray, 371, is referred to and confirmed in Silloway v. Nept. Ins. Co., 12 Gray, 73.

If a cargo be insured consisting in part of memorandum articles, and in part of other goods, no abandonment for a mere deterioration in value is valid, unless the deterioration in value of the articles not within the memorandum exceeds one half the value of all the goods insured.¹

The general rules of law applicable to memorandum articles we have already considered somewhat at length ; it remains, however, to determine (assuming that the underwriters are not liable for a constructive total loss) what amounts to an actual total loss.

SECTION V. — *Of Abandonment of Freight, Profits, and Commissions.*

THERE is a total loss of freight, when the ship and cargo are totally lost,² or the vessel becomes wholly innavigable ;³ or is subjected to a detention of such a character as to break up the voyage.⁴ It is said in some cases, that if the loss of the ship be only constructively total, that is, made so by abandonment, the owner may abandon also the freight, and claim as for a total loss of that.⁵ But if, although the ship itself be wrecked or otherwise lost, the master can transship and forward the goods by reasonable endeavors and at reasonable cost, we have seen that it is his duty to do so ; and, if he neglects this duty, the insurer is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss will be partial or total, according to its

¹ *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch, 39.

² In *Idle v. Royal Exch. Ass. Co.*, 8 Taunt. 755, the vessel was beating on the rocks and was in imminent danger of going to pieces. The master sold her, with the cargo, as she lay. At the time of the sale, the cargo could not have been got out. The sale was held to be valid and the loss of freight total, although the ship was afterwards got off and repaired and took on a cargo.

³ See *Mount v. Harrison*, 4 Bing. 388.

⁴ *Callender v. Ins. Co. of North America*, 5 Binn. 525. In this case, the vessel was so much damaged, that

it would have cost more to repair her than she would have been worth when repaired. The cargo could not have been sent on, except at an exorbitant rate of freight, and that in a vessel not large enough to take more than half the cargo. It was admitted that the freight was totally lost, and the only question was, whether the defendants were entitled by the abandonment to a *pro rata* freight. The court held, that, as the acceptance of the goods had not been voluntary, no freight was due.

⁵ *Ogden v. General Mutual Ins. Co.*, 2 Duer, 204 ; *McGaw v. Ocean Ins. Co.*, 23 Pick. 405.

amount when so adjusted. The master has a right to send forward the goods if he can; and, if he offers to do so, the shipper must either pay him full freight,—in which case there is no loss,—or let him send the goods forward, and on their arrival pay him freight.¹ Though it has been held, that, if the vessel is lost and

¹ In *Bradhurst v. Col. Ins. Co.*, 9 Johns. 17, the vessel was lost at an intermediate port, but the goods remained and were seized by government. The underwriters were exempt from loss by seizure in port. It was held, that, if the goods could have been sent on but for the seizure, the defendants were not liable. *Kent, C. J.*, said: "The point is, whether it be a good defence, in any case to an action on a policy on freight, that the ship-owner refused, or neglected, to forward the goods by another vessel, when he had it in his power. We have not met with any decided case on this point; but it appears to be reasonable, and consistent with the principles of the contract, that the insurers should, in such case, be discharged. The contract is, for the insurance of the freight of the cargo on board the ship *Dean*, from New York to Bremen. It is not of the essence of the contract, that the cargo should, in every event, be conveyed in the ship mentioned, because the party is allowed to change the ship from necessity. The delivery of the cargo is the cause of earning freight. The ship on board of which the goods are laden is the vehicle of conveyance agreed on, but it is only one of the means, and not in all cases the indispensable means, to attain the object. It is well understood and settled that when the vessel is disabled in the course of the voyage, and the cargo remains, the captain is authorized to forward it by another vessel, and thereby to earn the freight. . . . If other means to forward the cargo can be procured, it depends entirely upon

the captain's volition, whether he earns freight or not; and if it be lost by that volition, it ought not to be at the expense of the insurer, who only undertakes to answer for the loss of freight arising from *vis major*, and not from the act, unless it be the barratrous act, of the party. If the disabled ship be easily reparable, the ship-owner is bound to do it, and he cannot in that case resort to the insurer for his freight. If it be equally in his power to procure another vessel, and he does not, there is the same reason that he should be precluded from placing the consequences of that neglect upon the insurer."

And the language of the court in *Hugg v. Augusta Ins. & Banking Co.*, 7 How. 595, 609, is no less explicit. The vessel put into Nassau in distress. She was so much damaged that it would have cost more than half her value to repair her so that she could have brought home her cargo. The cargo was much damaged and was sold. The case came before the Supreme Court on a certificate of division from the Circuit Court. One of the questions certified was as follows: "If the jury find that, from the condition of the cargo sold at Nassau, it was for the interest of the insured and insurers upon the cargo that it should be so sold, and not transported to Matanzas, is the plaintiff entitled to recover for a total loss of freight, provided his own vessel could have been repaired within a reasonable time, so as to perform the voyage in safety, or he could have procured another vessel and have transmitted to

the goods cannot be sent forward at an expense less than the original freight, there is a total loss of freight;¹ yet, if the goods were sent on by the master, this would be on the original contract,² and therefore the ship-owner, having earned his freight, would not be entitled to claim it from the insurer, for the latter does not stipulate that the adventure shall be profitable, but

the port of destination, in its deteriorated state, the portion sold at Nassau." After full and elaborate arguments of counsel, the court directed it to be certified, that "if the jury find that, from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the cargo that it should have been sold, and not transported to Matanzas, still the plaintiffs are not entitled to recover as for a total loss of freight, provided their own vessel could have been repaired in a reasonable time, and at a reasonable expense, so as to perform the voyage, or they could have procured another at Nassau, the port of distress, and have transhipped the portion sold in specie to the port of destination." It seems to have been assumed, in the case of *Field v. Citizens' Ins. Co.*, 11 Mo. 50, that the underwriter would be liable for a loss of freight, if the original vessel was so much damaged that she could not take on the goods in a reasonable time; but, as the insured after the accident obtained from the insurers the following written document, it was held that they were not liable for any loss consequent on the accident: "The Citizens' Company will consider themselves bound by their policy of insurance on cargo and freight bill by the transfer of the same to steamboats Merrimack and Osage Valley on the part of the owners of the steamboat *Glaucus*."

¹ *Willard v. Millers & Manufacturers' Ins. Co.*, 24 Mo. 561.

² This was so held, in the case of

Shipton v. Thornton, 9 A. & E. 314, which was a suit between the master of a vessel and the owner of goods. The vessel put into an intermediate port in distress, and the master forwarded the goods to the port of destination at a less freight than that originally contracted for, and the court held that this was done under the original contract, and the consignees were liable for the whole freight which they had agreed to pay, and not merely for that paid to the substituted ship. And in *Rosetto v. Gurney*, 11 C. B. 176, 7 Eng. L. & Eq. 461, where, in a case of insurance upon goods, the question was discussed, whether the master should have sent forward the goods from the intermediate port, the court said: "If the voyage is completed in the original ship, it is completed upon the original contract, and no additional freight is incurred. If the master transships, because the original ship is damaged, without considering whether he is bound to transship or merely at liberty to do so, it is clear that he transships to earn his full freight, and so the delivery takes place upon the original contract." The fact also, that the change of ship through necessity does not discharge the underwriters on goods or freight from any loss which may occur subsequently to such change of ship, shows, we think, conclusively, that the transportation is made under the original contract. See cases *ante*, p. 63, n. 3, and *Field v. Citizens' Ins. Co.*, 11 Mo. 50, cited *ante*, p. 161, n. 1.

merely that he shall not be prevented by a peril of the sea from carrying on the cargo and delivering it in safety.¹ And if the master acted in this matter with good faith and reasonable discretion, the shipper must pay the extra cost of sending the goods forward.² And if he does not send them on, at least if it can be done at no greater expense than the original freight, it is difficult to see how the loss can be said to be total.

If the ship at an intermediate port can be repaired and take on the goods, the ship-owner may require that they should await the ship's ability to go on. If it be for the shipper's advantage to take the goods at once, he may do so, but then he must pay full freight.³ There is, therefore, no loss of freight in this case. And this has been held, where the delay would have been long, and the goods were damaged by water, and it would have required an expensive and long process to dry them so that they could safely go forward.⁴ And the same rule applies, where the ship, after sailing, puts back in a damaged condition to her original port of departure. It is generally held that the master is not obliged to part with the goods, except on payment of the full freight, if the goods were in such a condition that they could be taken on so as to arrive in specie.⁵ It seems to be held otherwise on our Western waters.⁶

¹ Thus, in *Ogden v. General Mutual Ins. Co.*, 2 Duer, 204, 215, *Bosworth, J.*, said: "The underwriters on freight do not contract that the voyage shall yield a profit to the assured, nor that it shall not cost him more to deliver the cargo, according to the terms of the bill of lading, than the aggregate gross amount of freight payable on delivery of the cargo, or the sum named in the policy as the measure of the underwriters' liability in case of total loss." This point was also determined in the case of *Everth v. Smith*, 2 M. & S. 278, where a vessel which had been detained by order of the government of a foreign country subsequently obtained a cargo and reached her port of destination and earned her freight, but the expenses of the detention made the adventure a losing one, and the court held that the underwriters were not liable.

² *Searle v. Scovell*, 4 Johns. Ch. 218.

³ *Lord v. Neptune Ins. Co.*, 10 Gray, 109; *Jordan v. Warren Ins. Co.*, 1 Story, 342; *Herbert v. Hallett*, 3 Johns. Ca. 93; *Griswold v. New York Ins. Co.*, 1 Johns. 205, 3 Ib. 321.

⁴ *Jordan v. Warren Ins. Co.*, 1 Story, 342; *Saltus v. Ocean Ins. Co.*, 14 Johns. 138; *Clark v. Massachusetts F. & M. Ins. Co.*, 2 Pick. 104; *Mordy v. Jones*, 4 B. & C. 394; *Herbert v. Hallett*, 3 Johns. Ca. 93.

⁵ *M'Gaw v. Ocean Ins. Co.*, 23 Pick. 405; *Lord v. Neptune Ins. Co.*, 10 Gray, 109; *Griswold v. New York Ins. Co.*, 1 Johns. 205; *Ogden v. General Mutual Ins. Co.*, 2 Duer, 204. But this doctrine has been held not to apply to the Western rivers of this country.

⁶ In *Field v. Citizens' Ins. Co.*, 11 Mo. 50, a steamboat on a trip from St. Louis to New Orleans put back to St. Louis

The protraction of the voyage from any cause gives no right of abandonment, if the ship finally arrives and earns her freight.¹

In England, it has been held, that the master is bound to repair the ship at an intermediate port, in order to bring on the cargo and earn his freight, if this can be done at an expense less than the value of the ship when repaired, although the expense would be greater than the value of the freight.² And if the master repairs the ship at an expense exceeding her value and that of her freight when repaired, and hypothecates both ship and freight to pay the expenses incurred, and afterwards pursues the voyage, delivers the goods, and the ship and freight are seized by the bond-holders, so that the owner derives no benefit from either, this is still no loss of freight which enables him to recover from the insurer on that interest.³

Nor does the fact that the ship was totally lost, and, being insured, the freight passed by abandonment to the underwriters on the ship, make the underwriter on the freight liable if he would not have been so had the owner not insured his vessel.⁴ Nor

in a damaged state, and was repaired in two weeks. The court held, that, as the trip could be made in half the time it took to repair the boat, and opportunities of reshipment occurred daily, and the character of the cargo on Western waters was generally such that it should be carried forward without delay, on account of its perishable condition and the uncertain state of the market, the insured could abandon the freight and recover a total loss. See also *Roe v. Crescent Mutual Ins. Co. of New Orleans*, 11 La. An. 408.

¹ *Everth v. Smith*, 2 M. & S. 278; *McCarthy v. Abel*, 5 East, 388.

² *Moss v. Smith*, 9 C. B. 94.

³ *Benson v. Chapman*, 2 H. L. Ca. 696, 8 C. B. 950, affirming the decision of the Exchequer Chamber, which reversed that of the Common Pleas, 6 Man. & G. 792.

⁴ *Scottish Marine Ins. Co. v. Turner*, 4 H. L. Ca. 312, note, more fully re-

ported 20 Eng. L. & Eq. 24. Freight was insured from Quebec to Liverpool. The vessel met with an accident while at sea, but was kept afloat, and arrived at Liverpool, where the cargo was delivered and the freight paid. But, as the vessel was a wreck, she was abandoned, and the abandonment, being held to relate back to the time of the disaster, carried with it the pending freight, and the ship-owners were held bound to account for it to the abandonees, the underwriters on the vessel. Upon this the assured in the policy on freight brought this action, on the ground that, although the cargo reached its port of destination, and freight was paid, yet they could not hold it to their own use, but received it for the abandonees of the ship, which was lost by a sea peril, and consequently the freight was lost to them by such peril; but the court held that the case must be treated precisely as if the ship had not been in-

does it make any difference, in this respect, that the ship and freight are insured by the same person.¹

The rule of fifty per cent has been held to apply to insurance on freight, as well as to the ship and cargo.² But as there is no loss of the freight if the goods can be sent on so as to arrive in specie, this rule, we think, should not be applied. And there is, we apprehend, a difference between the freight and the ship or cargo, in this respect, which will require some caution in its application to freight. In a recent case in Massachusetts, where the ship, having met with disaster, put back to her port of departure, and the cargo, being damaged, was sold by the master, and no

insured, and that, as the freight had been earned, the underwriters were not liable. This case was approved of by *Shaw*, C. J., in *Lord v. Neptune Ins. Co.*, 10 Gray, 109, and has been followed by a recent decision in *New York, Fiedler v. New York Ins. Co.*, 6 Duer, 282. See also *McCarthy v. Abel*, 5 East, 388.

But a different decision was given in the case of *Coolidge v. Gloucester Marine Ins. Co.*, 15 Mass. 341. This case was very similar to that of *Scottish Marine Ins. Co. v. Turner*, *supra*. The ship and freight were insured by the same company. The vessel put into an intermediate port in distress, where she was repaired, and the voyage was afterwards pursued and the cargo delivered in good order. The freight earned was the same which would have been earned had the ship met with no disaster. The ship and freight were abandoned while at the intermediate port, and the abandonment of the ship was accepted, but that of the freight refused. It was held that there was a total loss of freight. The reasoning of the court does not seem to us to be satisfactory. It proceeds on the ground that there was a constructive total loss of the ship at the intermediate port; that when the ship was rebuilt she was to be considered as a new

ship, and the case was to be considered the same as if the original ship "had sunk to the bottom of the ocean, or had been burned to ashes." The effect of this decision is to make an insurer on freight liable for the consequences of a contract with a third party, which would seem to be inequitable, and cannot, we think, be supported on principle or on authority. And, moreover, there seems to be no sufficient reason why the loss of freight should have been considered as total, even if the original ship had been burned, provided the goods remained and were forwarded, and arrived at the port of destination.

¹ *Scottish Marine Ins. Co. v. Turner*, 4 H. L. Ca. 312, 20 Eng. L. & Eq. 24; *Fiedler v. New York Ins. Co.*, 6 Duer, 282.

² *American Ins. Co. v. Center*, 4 Wend. 45. It was held in this case, that if there is a technical total loss of the vessel insured at an intermediate port, and the expense of sending on the cargo by another vessel will exceed a moiety of the freight agreed upon by a charter-party, it is a technical total loss of the freight which will authorize the assured to abandon. We know of no case resembling this, and no other where this precise point has been so decided.

freight *pro rata* was due, the court considered that there could be no abandonment, because "an abandonment must be of some part or portion of the subject insured," and here no freight was earned, nor was there any valuable right of earning freight by forwarding the goods to the port of destination, because freights had advanced.¹

The actual loss of the cargo is a total loss of freight, although the ship be not lost;² and if the cargo be at the intermediate port in such a state that to carry it forward would endanger the safety of the ship³ or the lives of the crew,⁴ this is considered a total loss; so is the constructive total loss of the cargo by capture or detention. But if the loss of the ship be made constructively total, by abandonment, and the insurers accept, repair, and offer to carry on the cargo of a charterer who has insured his freight, this is no loss of freight to him, any more than if the owners without abandoning had repaired.

If the ship is injured, and a subsequent repair is necessary, which requires considerable delay, as the master has a right to retain the cargo for freight, if he delivers it up without payment of freight, this is his own fault, and not a loss by a peril for which the insurers are answerable.⁵

If the goods remain in specie, and are delivered to the consignee, freight may be demanded, and therefore it is not lost, whatever be the degree of deterioration or the amount of damage; but they must remain what they originally were, and not be merely the products of decomposition, or fragments of a structure which no longer exists.⁶ We have already seen in the preceding volume that if barrels or boxes in which was oil or sugar or salt arrive in good order, but without the contents, the shipper is liable for the freight if the loss was owing to an intrinsic defect in the goods, as where they are lost by decay, evaporation, or leakage; but that the shipper is not liable where

¹ Lord v. Neptune Ins. Co., 10 Gray, 109.

² See the preceding cases.

³ Whitney v. New York Firemen's Ins. Co., 18 Johns. 208; Jordan v. Warren Ins. Co., 1 Story, 342.

⁴ Hugg v. Augusta Ins. & Banking Co., 7 How. 595, 609; Ogden v. Gen-

eral Mutual Ins. Co., 2 Duer, 204; Williams v. Kennebec Mut. Ins. Co., 31 Maine, 455.

⁵ See *ante*, p. 163, n. 3.

⁶ See vol. 1. p. 215, n. 4; and *ante*, p. 103, n. 1-4, as to what is considered as an existence in specie.

the contents are washed out by a peril of the sea.¹ In this latter case, therefore, as the ship-owner loses his freight by a peril of the sea, it follows that the underwriters are liable therefor, although the barrel or box arrives in safety.²

If the freight be wholly lost, and the ship can earn another for the same voyage, or for the remainder of the voyage if a part has been performed, it is said that the new freight so earned is to be accounted for to the insurers on freight,³ as belonging to them by way of salvage.³ But if the ship does not pursue the same voyage, but goes upon another, it has been held that the underwriters are not entitled to the freight earned on this substituted voyage.⁴

In speaking of the abandonment of the ship, it was remarked that this transferred to the insurers all the remaining rights and interests of the insured; and among these the power of earning a subsequent freight. If, therefore, the ship is insured in one place, and the freight in another, and the ship is abandoned, the insurers on the ship will take whatever subsequent freight the ship may earn. But the insurers on freight will take the freight previously earned;⁵ because every abandonment refers,

¹ See *Frith v. Barker*, 2 Johns. 327.

² *De Wolf v. State Mut. F. & M. Ins. Co.*, 6 Duer, 191.

³ *Green v. Royal Exch. Ass. Co.*, 6 Taunt. 68, 1 Marsh. 447; *Everth v. Smith*, 2 M. & S. 278. See also *Barclay v. Stirling*, 5 M. & S. 6; *Brocklebank v. Sugrue*, 1 Moody & R. 102.

⁴ *Jordan v. Warren Ins. Co.*, 1 Story, 342; *Lord v. Neptune Ins. Co.*, 10 Gray, 124. In *Charleston Ins. & Trust Co. v. Corner*, 2 Gill, 410, freight was insured at and from Monte Video to Cape Corrientes, and at and from thence to Boston. By a charter-party freight was due in Boston on the right delivery of the cargo. The vessel took in a cargo at Monte Video, went to Cape Corrientes, delivered her cargo, and, while loading another, was seized and taken back to Monte Video, where she was finally restored. The master claimed

full freight from the charterer, who refused to pay it, and, on a reference to arbitration, the vessel was allowed \$1,200, and the charter-party was cancelled. Cape Corrientes being then blockaded, the voyage was broken up and abandoned. Forty-seven days after the capture, the master chartered the vessel on another voyage from Monte Video to Havana. The court held that the vessel on being released was not bound to proceed to Boston, and that, if she had proceeded thither, full freight would not have been earned, only part of the cargo being on board; that the insured could recover as for a total loss, deducting the sum received by the master on the arbitration; and that the freight received on the new voyage did not go as salvage to the underwriters.

⁵ By the French law an abandonment of the ship gave to the underwrit-

in point of time, to the time of the loss which justifies the abandonment. And in this country, where there is an abandonment and constructive total loss and transfer, there is an apportionment of the freight. There is, however, a wide difference between the law of England and that of this country in regard to the apportionment of freight. In English law, not only is no freight earned *unless* the goods arrive, but it is considered that no freight is earned *until* they arrive.¹ Hence there is no apportionment of a pending freight not actually accrued; and therefore, if a disaster occurs to a vessel during the voyage, and there is an abandonment of the vessel, the whole of the freight passes by the abandonment of the ship. But by the rule in this country there is an equitable apportionment, according to the proportion of the voyage performed at the time of the disaster. If the vessel is abandoned to the insurers of the ship, and the freight is abandoned to the insurers of the freight, both abandonments are held to refer to the time of the disaster. So much of the freight as was earned before that time goes to the insurers on freight; so much as was earned after that time, to the insurers of the vessel.² Mr. Arnould appears to prefer the American

ers the benefit of the freight pending at the time of the loss. Boulay Paty, tome 3, p. 481; Valin, tome 2, p. 115; Emerigon, ch. 17, § 9. In England the point does not appear to be fully settled. See *Luke v. Lyde*, 2 Burr. 882; *Morrison v. Parsons*, 2 Taunt. 407; *Thompson v. Rowcroft*, 4 East, 34; *M'Carthy v. Abel*, 5 East, 388; *Ker v. Osborne*, 9 East, 378; *Sharpe v. Gladstone*, 7 East, 24; *Case v. Davidson*, 5 M. & S. 79; *Davidson v. Case*, 2 Brod. & B. 379; *Stewart v. Greenock Mar. Ins. Co.*, 2 H. L. Ca. 159. In this country, it seems now to be well settled that the freight earned prior to the loss goes to the underwriter on freight, and that earned subsequently goes to the underwriter on the ship. Thus, in *Coolidge v. Gloucester Ins. Co.*, 15 Mass. 341, 346, Mr. Justice *Putnam* says, speaking of the loss: "Until that event happens, the property remains in

the assured; and the freight or earnings belong to him till that time, if he stands his own insurer for the freight; otherwise to the insurer on the freight. But after the loss has happened, the insurers, in virtue of the abandonment, become the owners, and are liable to the repairs and expenses, and entitled to the earnings of the ship." See also *United Ins. Co. v. Lennox*, 1 Johns. Ca. 377; *Leavenworth v. Delafield*, 1 Caines, 573; *Simonds v. Union Ins. Co.*, 1 Wash. C. C. 443; *Kennedy v. Baltimore Ins. Co.*, 3 Harris & J. 367; *Teasdale v. Charleston Ins. Co.*, 2 Brev. 190.

¹ *Case v. Davidson*, 5 M. & S. 79, confirmed in the Exchequer Chamber, 2 Br. & B. 379.

² *United Ins. Co. v. Lennox*, 1 Johns. Ca. 377; *Marine Ins. Co. v. United Ins. Co.*, 9 Johns. 186; *Davy v. Hallett*, 3 Caines, 20; *Livingston v. Col. Ins.*

rule as "more free from objections than our own";¹ but says in a note, that "the case of *Stewart v. Dennison*, in the House of Lords, not yet decided there, appears to open afresh the whole question." We find a case we suppose to be this in the 2 H. of L. Cases, 159, under the name of *Stewart v. Greenock Mar. Ins. Co.* It fully confirms the case of *Davidson v. Case*. A ship struck an iceberg, reached Liverpool, delivered its cargo, and was abandoned as incapable of repair. The shippers paid the freight to the ship-owner. And it was held that the insurers, by the abandonment of the ship, were entitled to the whole of it; "the freight, while the ship is earning it, being only a benefit or advantage incident to the ship, and therefore becoming the property of the underwriters paying for a total loss";² the part actually earned before the loss going to the insurers of freight, and no more; while that earned afterwards goes to the owner of the ship, or to his transferees by abandonment. And demurrage, which is allowed on capture and subsequent restoration, is, we think, so far in the nature of freight, that it is to be treated as salvage on the freight.³

Freight, like all other insurable interests, may be valued; and we should hold, on general principles, that the valuation binds the parties, but only in reference to that property or interest which is valued. Even this, however, seems to be doubted. We think, however, that if one who is insured on valued freight abandons, but a part of his goods, in respect to which the valuation of freight was made, arrive safely, he must account for the freight on that part according to the valuation. But if he receives freight for other goods carried safely, which belong to other shippers, he is to allow for what he actually receives and no more, because this alone belongs to the insurers in the nature of salvage.⁴ Where the vessel

Co., 1 Johns. 438; *Coolidge v. Gloucester Ins. Co.*, 15 Mass. 341; *Simonds v. Shaw, C. J.*, in *Lord v. Neptune Ins. Co.*, 10 Gray, 122.

Union Ins. Co., 1 Wash. C. C. 443; ¹ See *Coggeshall v. Read*, 5 Pick. 454.

Hammond v. Essex F. & M. Ins. Co., 4 ² *Dumas v. United States Ins. Co.*, 12 S. & R. 437. The freight in this case was valued at \$7,500. The vessel was captured, and the freight abandoned, and the loss paid. Subsequently, the vessel and a part of the cargo were restored, and the voyage performed in

3 Harr. & J. 367. ³ Arnould on Ins. 1153.

⁴ The difference between the law of England and that of this country, on this point, is very clearly stated by

is under a charter-party, the underwriters are sometimes liable for a total loss of the freight, although the goods have never been on board, if the goods are contracted for and the vessel is prevented from loading by a peril insured against.¹ So the terms of the charter-party in many other instances determine whether or not there is a loss of freight. Thus, where the risk is entire, and a part of the voyage is performed, and the voyage is thus broken up, this is a loss of the whole freight, even if under an ordinary contract of shipment freight *pro rata* would be due.²

Profits are so far distinct from cargo, that, if both are insured, it is said that there may be a several abandonment of each.³ But it is not easy to see how anything can pass by the abandonment of profits. For the insurers on goods take by the abandonment to them everything on which profits have been made, or can be made or saved. Indeed it may be remarked in general, that, as an abandonment of the profits alone can pass nothing, it is not easy to see that there can be any effectual abandonment of profits, or — what would necessarily follow — that an actual partial loss of profits can be made constructively total by abandonment. If a

safety. The insured owned part of the cargo, and the rest was owned by different shippers, and shipped at various rates of freight. The underwriters claimed that the whole freight saved should be estimated at the rate of the valuation; but the insured, although he admitted his liability for his own goods, according to the valuation, yet claimed, in respect to the other goods, that he was only liable for the amount actually received; and of this opinion was the court, and a doubt was expressed whether the valuation would be binding upon him in respect to his own goods.

¹ See *ante*, vol. 1, pp. 166–191.

² See *Atty v. Lindo*, 4 B. & P. 236; *Charleston Ins. & Trust Co. v. Corner*, 2 Gill, 410; *Livingston v. Columbian Ins Co.*, 3 Johns. 49; *Robertson v. Majoribanks*, 2 Stark. 573.

³ *Abbott v. Sebor*, 3 Johns. Ca. 39. *Kent, J.*, in this case, said: "Perhaps the established rule in respect to ship and cargo of a loss of more than half the value may be applicable. If so, the question here will be, whether the more profitable half of the cargo might not have been brought in the same ship to New York. I suggest this as a rule which may, perhaps, apply, but without giving any opinion upon it."⁴ In *Tom v. Smith*, 3 Caines, 245, it was held that, as between the insured and the insurer on profits, the latter is entitled to an abandonment. And in *Mumford v. Hallett*, 1 Johns. 433, where the vessel and cargo were captured and abandoned, but afterwards restored, it was held that the insured on profits was entitled to abandon, notwithstanding the abandonment to the insurer on the cargo.

part of the goods, the profits on which are insured, is lost, this is certainly a partial loss of the profits.¹

If more than half in value of these goods are lost, the owner of the goods may abandon, and make the loss total; but if he does, he transfers the remaining goods with all their value, and leaves nothing in himself to transfer by abandonment of the profits alone. It would seem, therefore, that the fifty-per-cent rule would not apply to an insurance on profits, unless the insured should waive his right to abandon the goods, and, treating the loss on them as partial, abandon the profits separately. In theory this might be possible; but it would be attended with some difficulties, and can hardly be considered as in fact practicable. It was held in an early case, that, unless the very ship in which the goods were shipped carried them the whole way to the port of destination, there was a loss of profits, thus making the insurance on profits equivalent to a warranty that the ship and goods should both arrive in safety.² But this case was probably on a wager policy, and is clearly opposed to principle.

If the insurance be on commissions, there can be no transfer by abandonment of the right or capacity of earning them; and if the peril has prevented the exercise of this right or capacity, there can be nothing to abandon, and indeed it is difficult to see how, in practice, a party insured on his commissions can make any effectual abandonment. But if they have been earned, and the funds or property from which they are payable be partially lost or destroyed, it is possible that the remaining interest or claim in the

¹ In *Loomis v. Shaw*, 2 Johns. Ca. 36, profits were insured from New York to Havre. The ship and goods were captured and carried into London, and five eighths of the cargo were restored. This portion was accepted by the plaintiffs and appropriated to their own use. The court held that, "profits are necessarily incidental and subject to the final disposition of the goods, on which they are expected to accrue," and that, as only three eighths of the cargo were lost, there was only a partial loss on the profits to that extent.

² *Henricksen v. Margetson*, 2 East,

549, note. The vessel in this case was lost at an intermediate port, but most of the cargo was carried on at the expense of the underwriters, and arrived in safety. Lord *Mansfield*, C. J., said: "The meaning of the policy seems to be, that the ship and cargo shall arrive at the destined port, and the insurance is on the profit of that particular ship and cargo. But the market varies and may depend on twenty-four hours sooner or later; so that, unless the very ship and cargo arrive, the profit may fail, and the insurance is lost."

insured may be subject to abandonment; although such a state of things is not very likely to exist in fact.¹

SECTION VI. — *Of the Form and Manner of Abandonment.*

No especial form of abandonment is prescribed by law or usage;² but the word "abandon" should be used;³ although other phrases which meant distinctly and precisely the same thing would probably be sufficient. Nor would it seem to be strictly necessary that it should be in writing,⁴ or, if in writing, in one instrument.⁵ And it has been implied from the insured's handing over a consular certificate of a loss and an abandonment by the master, who had, however, no authority to abandon, — the act of the insured in handing over the certificate being considered a ratification of the abandonment by the master.⁶ However made, it must be distinct and unequivocal, and purport an absolute abandonment and transfer of all salvage to the insurers.⁷ And it should state substantially the grounds on which the abandonment is made; and the cause stated must be a peril within the policy.⁸

¹ See *New York Ins. Co. v. Robinson*, 1 Johns. 616.

² *Bell v. Beveridge*, 4 Dall. 272, 1 Binn. 52, note; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 622, per *Thompson, J.*

³ *Parmeter v. Todhunter*, 1 Campb. 541, per Lord *Ellenborough, C. J.*

⁴ In *Read v. Bonham*, 3 Brod. & B. 147, *Dallas, C. J.*, was of the opinion, at *nisi prius*, that a parol abandonment was sufficient, and the point was not raised before the court *in banc*. See also *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604, 622, per *Thompson, J.* In *Crousillat v. Ball*, 3 Yeates, 375, 378, it was stated by counsel that "in the Supreme Court of the United States, *Duncan v. Coates*, Judge *Chase* held that a verbal notice of abandonment to an insurance broker was sufficient." Lord *Ellenborough*, in *Parmeter v. Todhunter*, 1 Campb. 541, said: "It would be very

well to prevent parol abandonments entirely; but if they are allowed, I must insist upon their being express. An implied parol abandonment is too uncertain, and cannot be supported."

⁵ *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, per *Story, J.*

⁶ *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604.

⁷ *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604; *Fuller v. M'Call*, 1 Yeates, 464.

⁸ In *Hazard v. New England Mar. Ins. Co.*, 1 Sumner, 218, Mr. Justice *Story* said that he had always supposed that a letter of abandonment must state the cause of the loss, but for the purposes of the trial he ruled that the one in question was sufficient. In *Peirce v. Ocean Ins. Co.*, 18 Pick. 83, it was stated that the vessel had been damaged, condemned, and sold, but the abandonment was held to be insuffi-

But a demand for a total loss is not, in our opinion, necessarily and of itself the equivalent or the evidence of abandonment, because it may be only an abandonment itself which, as a previous

cient, *Shaw, C. J.*, saying: "It has already been mentioned as a requisite to a good abandonment, that it must state the reasons and grounds upon which a total loss is claimed." So held, also, by *Curtis, J.*, in a case where the vessel was stated to have been condemned. *Bullard v. Roger Williams Ins. Co.*, 1 *Curtis C. C.* 148, 152. And if the owner alleges one cause he is bound by it, and cannot recover on proof of loss by another peril insured against. *Suydam v. Marine Ins. Co.*, 1 *Johns.* 181; *Dickey v. New York Ins. Co.*, 4 *Cow.* 222; *King v. Delaware Ins. Co.*, 2 *Wash. C. C.* 300. The case of *Macy v. Whaling Ins. Co.*, 9 *Met.* 354, established an exception to the general rule to the effect that where the letter of abandonment does not state the cause of the loss, but refers to intelligence which the insured has received, the abandonment will not be defective, "because the underwriter can call for the information upon which it is grounded, and time will be allowed for the purpose, before he would be required to decide as to his acceptance or refusal." The recent case of *Heebner v. Eagle Ins. Co.*, 10 *Gray*, 131, was decided in conformity to this exception. The letter of abandonment was as follows: "Having received information of the condemnation of the steamer *Chesapeake* at *Humboldt, California*, I hereby abandon all in said vessel insured by policy, etc., and claim as for a total loss." This was held sufficient, on the ground, we presume, that if the word "condemnation" did not convey a definite idea of the cause of the loss to the mind of the insurer, he could have asked for the information

which the assured had received. In *Ralston v. Union Ins. Co.*, 4 *Binn.* 386, 400, the letter of abandonment was as follows: "A letter from Messrs. *T. Davy and J. Roberts*, dated *London, July 8, 1805*, and which came to hand yesterday, advises: 'We have now letters from Messrs. *J. Ridgway, Mertens & Co.*, and *Mr. Hemphill*, of the 27th ult. and 1st inst., by the first of which we learn that the ship, having been condemned as not sea-worthy, would be sold for the benefit of the underwriters.' The above information alludes to the ship *Benjamin Franklin* as she lay at *Antwerp*, and, in consequence thereof, I do hereby abandon the three fourth parts of said ship, and claim as for a total loss." The court said, that, although the manner in which this letter was penned was very questionable, yet they were warranted to infer from the tenor of the letter, that the different papers were exhibited therewith to the underwriters, and, if these contained a valid cause of abandonment, it would be sufficient, although it was not formally expressed. In *Citizens' Ins. Co. of Missouri v. Glasgow*, 9 *Mo.* 406, the letter of abandonment stated that the steamboat insured having been nearly destroyed by a late disaster, and being completely beyond repairs, was abandoned. It was held that, though this might be insufficient in a marine policy, yet as the boat had been towed to the port where the insurance company was located, and they had caused a thorough investigation into the condition of the boat after they received notice of the abandonment, it was enough.

requisite, gives the right to claim for total loss; but it has been sometimes so held; and we admit that it should be so, if the terms of the demand, aided by the circumstances of the case, could give to the demand the plain meaning and intention of making by it an abandonment and transfer of salvage.¹ It has been held in a

¹ In *Cassedy v. Louisiana State Ins. Co.*, 18 Mart. La. 421, a simple demand for a total loss, without the cause of the loss being stated, or any offer to abandon being made, was held sufficient to entitle the assured to recover. This case is wholly unsupported by authority. Mr. *Phillips*, in his work on Insurance, § 1682, says: "A letter to the underwriters, containing a statement of the loss, and inclosing an account of the sale of the property, and claiming the balance of the amount insured, after giving credit for the salvage, was held to be a sufficient abandonment. *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604. Mr. Justice *Thompson*, giving the opinion of the court, said, that a letter making such a statement and claim "leaves no doubt as to the intention and understanding of the parties." This brief statement of the case may, we apprehend, lead to an erroneous impression, not only of the point decided, but also of the meaning of the language of Mr. Justice *Thompson*, above cited. The plaintiffs stated in their letter that they forwarded thereby the protest and surveys of the vessel, and said that they had heard before of the condemnation of the vessel, but did not know the cause till then, and also said that they would forward by the next boat a statement of the loss, with the necessary vouchers. The receipt of this was acknowledged by the underwriters, who said that the further proofs of loss should receive immediate attention on arrival. When these were sent, together with a statement of the loss, the underwriters replied that they

had resolved to take time to consider about the adjustment of the loss. The protest contained an abandonment by the master. Mr. Justice *Thompson* said: "This correspondence, independent of the protest, leaves no doubt as to the intention and understanding of the parties with respect to the abandonment. This would, however, be matter of inference only. But the protest is direct and explicit, both in form and substance."

Lord *Ellenborough* in *Parmeter v. Todhunter*, 1 Campb. 541, held that a demand for a total loss did not amount to an abandonment, and the same was assumed to be the law in *Watson v. Ins. Co. of N. A.*, 1 Binn. 47. See also *Martin v. Crockatt*, 14 East, 465. In *Murray v. Hatch*, 6 Mass. 465, 478, *Sewall, J.*, said: "If a loss had been proved in this case, total in its own nature and in the sense of the parties to this contract, limited as it is by the memorandum which has been considered, a statement of the salvage remaining is all that would be requisite, in my opinion, to the claim of the assured to a total loss; that is, to enable him to recover the sum insured, deducting the amount of salvage received by the assured or his agent. In this opinion, however, my brethren do not concur with me." The question was raised in *Peirce v. Ocean Ins. Co.*, 18 Pick. 83, 93, but was not decided; *Shaw, C. J.*, said: "A question has been made whether a claim for a total loss does not necessarily imply an abandonment. It is difficult to answer a question thus

late case that it is sufficient evidence of an abandonment, that the insured, within ten days after receiving the news of a loss of a vessel, went to the underwriter's office and asked for the papers of the vessel, which included the survey on which she had been condemned and sold, and, on the president of the office saying that the adjuster had them and had not made up the loss, the insured replied that there was nothing to make up, as he claimed a total loss.¹

In a recent case in Massachusetts, the abandonment stated that the vessel had been obliged to put into port in distress in consequence of a peril, and, being found "irreparable" on survey, she was condemned and sold. It was held that the abandonment was sufficient, and that the word "irreparable" meant that the vessel had sustained damage by a peril insured against to an amount sufficient to absolve the insured from the necessity and duty of making repairs upon her, and to justify a claim for a total loss.² And in another case in the same volume, the insured, on the 13th of December, stated that the vessel had been condemned and was to be sold, and that he abandoned the vessel and claimed for a total loss. Accompanying this was a letter from the master stating that the vessel required extensive repairs, but not stating any cause for them. Nearly a month later the insured went with the master to the office of the insurers, exhibited to them the protest and survey, which showed that the vessel had met with disaster, and claimed a total loss. The court doubted whether the first abandonment, with the letter of the master, was sufficient, but held that subsequently showing the protest and survey, and claiming a total loss in connection with the previous abandonment, were enough.³ In a recent case in New York, where insurance was effected on certain hogsheads of sugar, the vessel put

nakedly presented. Upon principle, it would seem that a mere claim for a total loss does not necessarily imply an abandonment, because in some cases a total loss may be recovered without abandonment. But commonly a claim for a total loss will be accompanied by a statement of facts and circumstances, by the reasons and grounds of claim upon which the assured proceeds, and such

statements of the grounds of claim may, perhaps, carry as plain an implication of actual abandonment as could be done by express words."

¹ *Silloway v. Nept. Ins. Co.*, 12 Gray 73.

² *Perkins v. Augusta Ins. Co.*, 10 Gray, 302.

³ *Thwing v. Washington Ins. Co.*, 10 Gray, 443.

into port in distress, and the letter of abandonment, after stating this fact, added, "The cargo was landed and seriously damaged." Mr. Justice Duer was of the opinion that this abandonment was insufficient, on the ground that the letter of abandonment did not necessarily import that the damage exceeded half the value of the goods. But his decision was reversed by the full court, on the ground that the facts set forth stated a cause of loss, a peril insured against, and such information as rendered the inference of a constructive total loss highly probable.¹

If without abandonment a total loss is paid, this must proceed only on the ground that it was unnecessary, from the entire absence of salvage; and therefore, if any salvage comes up afterwards, it will pass to the insurers as paid for by them. And if an abandonment is wanting in any formality, the insured may waive all objection; and they do this by calling for the proof, and acting as if the abandonment were altogether sufficient.²

¹ *McConochie v. Sun Mut. Ins. Co.*, 3 Bosw. 99.

² In *M'Lellan v. Maine F. & M. Ins. Co.*, 12 Mass. 246, the underwriters were informed of the loss, and a demand was made for the whole sum insured, and sundry payments were afterwards made on account of this demand. It was held that "the jury were warranted to conclude either that there had been an offer to abandon, or that both parties considered the chance of recovery as altogether hopeless, and that an abandonment would therefore be an idle ceremony; and that the loss was thereupon adjusted, and the defendants agreed to pay the sum demanded. If such an agreement were made," said the court, "without any fraud or mistake, the defendants are bound by it; and cannot now object the want of evidence of a formal offer of abandonment." See also *M'Intire v. Bowne*, 1 Johns. 229. In *Calbreath v. Gracy*, 1 Wash. C. C. 219, it was urged that the underwriters,

when they received notice of the loss, instead of offering to pay, called for the papers to prove the loss, and thus dispensed with the necessity of a formal offer to abandon. Mr. Justice Washington said: "It is a sufficient answer to say that on the 10th July (the day notice was given), no demand of payment was made or offer to abandon. The underwriters were not bound to hasten the assured in making their election, nor offer to pay before it was demanded. The demand of payment never was made until December, nearly four months after the assured had received notice of the capture. Whether the demand then was equivalent to a more formal abandonment, I will not determine, but, if it were, it was unreasonably delayed, and so as to defeat every chance of recovery which the underwriters would have had if the demand had been made on the 10th of July, or in a reasonable time afterwards."

SECTION VII. — *Of the Acceptance of Abandonment.*

THIS is never necessary to the full effect of an abandonment, because the rights of the insured do not depend on the acknowledgment or assent of the insurers. But, if formally made by those having authority,¹ it binds the insurers, admits an abandonment and that the claim is for total loss, and supplies all want of formality in the abandonment.² And because the acceptance is not necessary to give the insured his rights, there is no obligation on the insurers either to accept, or to declare that they do not accept. If they say nothing and do nothing, the conclusion should be that they do not intend to accept, and then the insured is left to whatever rights and remedies he may have upon his contract.³

There is no especial form for an acceptance; whatever indicates sufficiently an intention to accept will have this effect; and it has been said, and on good grounds, that if the insurer refuses to accept,

¹ In *Beatty v. Marine Ins. Co.*, 2 Johns. 109, the act incorporating the company provided that "no money on losses, arising on any policy, should be paid without the approbation of at least four of the directors, with the president and his assistants, or a majority of them." It was held that an acceptance of an abandonment, made by the president and his assistants without the concurrence of the four directors, was not binding on the company.

² In *Smith v. Robertson*, 2 Dow, 474, 482, the vessel was captured, abandoned, and the abandonment accepted. On the afternoon of the same day news came that the vessel had been recaptured. The underwriters were held liable on the ground that "they could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss."

³ Mr. Justice *Story* in *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, 81, states the law as follows: "The underwriter

is not bound to signify his acceptance within a reasonable time; nor can his silence *per se* be proof of his acceptance. If he says nothing and does nothing, the proper conclusion is, that he does not mean to accept. And this conclusion, so reasonable in ordinary cases, applies with still more force to corporations, because, from their mode of doing business, deliberation of the board of directors is usually required; and silence in such a case is certainly less significant than it might otherwise be presumed to be." See also *Badger v. Ocean Ins. Co.*, 23 Pick. 347. But in *Hudson v. Harrison*, 3 Brod. & B. 97, a case decided a year earlier, it was held that underwriters who intend to refuse an abandonment must do so within a reasonable time, and their not having refused in this case till three months after the abandonment was made was held to prove their acquiescence. We do not think that this would be regarded as law by the American courts.

and expressly declares that he intends not to accept, but nevertheless does some act which can be understood or justified only as the exercise of a right which nothing but an acceptance could give, his act controls his words, and he will be held to have accepted the abandonment.¹ On the other hand, if the assured does what might defeat and avoid his abandonment, the insurers may waive the effect of these acts, and they do so by continuing to treat the abandonment as originally invalid.²

As a demand for a total loss is not conclusive proof of abandonment, so neither is a payment of a total loss conclusive proof of abandonment and acceptance; but it would raise a strong presumption to that effect, and, if made with a knowledge of all the circumstances, would doubtless bar the insurers from availing themselves of any want either of abandonment or acceptance.³

¹ *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, 81, per *Story, J.*; *Badger v. Ocean Ins. Co.*, 23 Pick. 347, 355. We have before considered the effect which the act of repairing the ship by the underwriters has upon their refusal to accept the abandonment, and merely refer to it here. See *ante*, p. 142, n. 1.

In *Griswold v. New York Ins. Co.*, 1 Johns. 205, 3 Johns. 321, which was an action on a policy on freight, the vessel was damaged and put back to her port of departure, and the agent of the defendants, who were also the insurers of the ship, was on board and superintended and directed the unloading of the ship. It was claimed that this amounted to an acceptance of the abandonment, but the court held that the acts of the agent were only such as were requisite to the unloading and repairing of the ship, and were not referable to the subject of freight. Lord *Kenyon*, C. J., held in *Thelluson v. Fletcher*, 1 Esp. 73, that where a partial loss had taken place, and the insured wrote to the underwriters informing them of the particulars of the injury, and the answer was returned that they desired

that the assured would do the best they could with the damaged property, this was not an acceptance of an abandonment if any were made.

² *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. 159.

³ In *Tunno v. Edwards*, 12 East, 488, the underwriter brought an action to recover back money paid under the following circumstances. The cargo insured was seized and confiscated by the Dutch government. Before the proofs of the loss arrived, the plaintiff agreed to pay the defendant £50 per cent on account, which was accordingly done. The cargo was valued in the policy at £1,500. The Dutch government finally consented to restore half the proceeds of the cargo, which, after deducting all expenses, amounted to more than the sum at which it was valued, and this amount was paid over to the defendant. The court held, that, if the loss had been total, the underwriter could have maintained his action, the assured having received more than indemnity, but the loss not being total, there being no abandonment, the defendant was entitled to a verdict.

It has been held that a purchase of the ship by insurers, from those who bought at a sale by the master without necessity, was not equivalent to acceptance, and no admission of liability for a total loss.¹

SECTION VIII. — *At what Time the Abandonment may or should be made.*

IN general, the insured has the right of abandonment when the ship, for all the purposes of the voyage, is taken from the master's control by a peril insured against, and it is uncertain when he can again have the control of the ship, in a condition to renew the voyage; or when the cost of putting her in that condition is out of proportion to her value.² And it has been said that it is not essential to a valid abandonment that the assured should have information of facts which, if true, would make the inference that a constructive total loss had occurred necessary and unavoidable, but it is enough if such information renders such a result highly probable.³

While we may look only at the facts as they seemed then to be, when we inquire into an exercise of extraordinary power by the master, as in selling a ship, it is said to be the rule in respect to an abandonment that it must be justified, not by seeming, but only by existing facts. If a vessel be captured, and the owners, upon receiving intelligence of this, abandon her, and, before the abandonment is made, she is restored to the captain in a condition to prosecute the voyage, this makes the abandonment void, although neither the insurers nor insured had, or could have had, any intel-

¹ *Badger v. Ocean Ins. Co.*, 23 Pick. 347.

² In *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, 65, Mr. Justice Story said: "If there be any general principle that pervades and governs the cases, it seems to be this, that the right to abandon exists whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume

the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage." This language seems to be applicable to the case of capture, and perhaps to blockade and embargo, but not to the submersion or stranding of the vessel, unless the loss is in the highest degree probable. See *post*, p. 181, n. 3, p. 182, n. 1.

³ *M'Connochie v. Sun Mut. Ins. Co.*, 3 Bosw. 99.

ligence of this restoration.¹ But this does not prevent the abandonment from being valid, if the circumstances existing at the time it is made are such as would justify it,² although later events

¹ *Church v. Bedient*, 1 Caines, Ca. 21; *Hallett v. Peyton*, 1 Caines, Ca. 28; *Penny v. New York Ins. Co.*, 3 Caines, 155; overruling *Mumford v. Church*, 1 Johns. Ca. 147; *Slocum v. United Ins. Co.*, 1 Ib. 151; *Murray v. United Ins. Co.*, 2 Ib. 263; *Livingston v. Hastie*, 3 Ib. 293. This point was raised, but not decided, in *Dorr v. New England Marine Ins. Co.*, 4 Mass. 221, Mr. Chief Justice *Parsons* observing, that, in a case in the Circuit Court for the Massachusetts District, it was admitted by counsel to be the usage of merchants to be governed by the facts of which intelligence had been received, and the court considered the law to be in accordance with the usage. The law was so laid down in Scotland, *Robertson v. Stewart*, Bell, Comm. 520, but, when the case came before the House of Lords, it was decided on another point. *Smith v. Robertson*, 2 Dow. 474. But in this country, although a doubt was formerly expressed by Mr. Justice *Washington*, in *Beale v. Pettit*, 1 Wash. C. C. 241, yet the law is now well settled, that the state of facts actually existing at the time of the abandonment determines the right of the assured. *Marshall v. Delaware Ins. Co.*, 4 Cranch, 202, 2 Wash. C. C. 54; *Alexander v. Baltimore Ins. Co.*, 4 Cranch, 370; *Adams v. Delaware Ins. Co.*, 3 Binn. 287. In England the point was presented in some cases, *Bainbridge v. Neilson*, 10 East, 329; *Naylor v. Taylor*, 9 B. & C. 718; *Parsons v. Scott*, 2 Taunt. 363; but under the English rule, stated *infra*, it was not necessary to decide it. Lord *Ellenborough*, however, in the first of these cases, at *nisi prius*, held that the insured was entitled to recover.

² In England the law is, that the state of facts existing at the time the action is brought, and not that at the time of the abandonment, determines the right of the assured to recover. Lord *Mansfield*, in *Hamilton v. Mendes*, 2 Burr. 1198, 1210, states the rule as follows: "The plaintiff's demand is for an indemnity. His action then must be founded upon the nature of his damnification as it really is at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification is in truth an average, or perhaps no loss at all." It is true that in this case the vessel was restored before abandonment, so that the question did not arise whether the facts at the time of the abandonment, or those at the time of the bringing of the action, should determine the fact of the loss; but the language above cited is the foundation for the rule as it now exists in England. *M'Carthy v. Abel*, 5 East, 388; *Patterson v. Ritchie*, 4 M. & S. 393; *Bainbridge v. Neilson*, 10 East, 329; *Naylor v. Taylor*, 9 B. & C. 718; *Parsons v. Scott*, 2 Taunt. 363. See note, *supra*. Lord *Eldon*, in *Smith v. Robertson*, 2 Dow, 474, doubts the correctness of the rule, but it seems to be well established by authority. In this country, the rule seems to be equally well settled that the right of abandonment depends upon the facts existing at the time when it is made, and cannot remain in suspense, or be divested by subsequent events. *Peele v. Merchants' Ins. Co.*, 3 Mason, 27, 61; *Humphreys v. Union Ins. Co.*, 3 Mason, 429; *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. 541; *Rhineland v. Ins. Co.*

show the peril or the loss to have been much less than was supposed, and the recovery of the vessel easier and less costly.¹

For it is distinctly held that, if a stranded ship be abandoned, under circumstances which sufficiently indicate the hopelessness of her condition, this abandonment is valid, although the purchasers, or the insurers, may succeed in getting her off and repairing her with little difficulty or cost; the ship being found not to be in so bad a condition as was thought, and in such a state that a subsequent abandonment would have been ineffectual.²

It is quite certain, however, that neither stranding,³ nor sub-

of Pennsylvania, 4 Cranch, 29; Chesapeake Ins. Co. v. Stark, 6 Cranch, 268; Jumel v. Marine Ins. Co., 7 Johns. 412; Lee v. Boardman, 3 Mass. 238; Dutilgh v. Gatcliffe, 4 Dall. 446, 4 Cranch, 31, note; Schieffelin v. New York Ins. Co., 9 Johns. 21, 26. In Munson v. New England Marine Ins. Co., 4 Mass. 88, the loss was not payable by the terms of the policy until sixty days after notice of the loss. At the time the abandonment was made the vessel was detained by captors, but was restored before the expiration of the sixty days. The court held that the right to recover for a total loss vested in the assured by the abandonment, and could not be affected by the credit given to the assurers. In Dutilgh v. Gatcliffe, *supra*, it was held, that if the abandonment was made before the vessel was restored, though after the decree of acquittal, it was valid, and the assured might recover as for a total loss; but this point has been determined otherwise by the Supreme Court of the United States. Marshall v. Delaware Ins. Co., 4 Cranch, 202. Marshall, C. J., said: "The court cannot suppose such a danger to have existed after a final sentence of acquittal, unless some order of a court relative to a reconsideration could be shown, or it should appear that some other delays were interposed by the court which had

pronounced the sentence, or by the sovereign of the captor." In a subsequent case in Pennsylvania, the court distinguished these two cases, on the ground that in Dutilgh v. Gatcliffe the vessel had been condemned by an inferior court, from which an appeal might have been taken, and it was held, that, after an acquittal and an order of restitution had been given by the court of last resort, an abandonment could not be made, although it were before the vessel had been actually restored. Adams v. Delaware Ins. Co., 3 Binn. 287.

¹ See cases cited in preceding note. In Peele v. Merchants' Ins. Co., 3 Mason, 27, 40, Mr. J. Story said: "We are not to judge of this case by subsequent events, except so far as they operate by way of evidence upon the pre-existing state of the ship. The right of abandonment depended altogether upon the facts as they *then* were, and upon the conclusions which reasonable men ought then to have drawn from them in the exercise of sound discretion."

² Peele v. Merchants' Ins. Co., 3 Mason, 27; Fontaine v. Phoenix Ins. Co., 11 Johns. 298; King v. Middletown Ins. Co., 1 Conn. 184; Howland v. Marine Ins. Co., 2 Cranch, C. C. 474.

³ Bosley v. Chesapeake Ins. Co., 3 Gill & J. 450; Wood v. Lincoln & Kennebec Ins. Co., 6 Mass. 479; Patrick v.

mersion,¹ nor any loss that leaves the probability of recovery, gives, of itself, at once, and necessarily, the right to abandon; for it is the duty of the master to examine sedulously, and use, to the best of his skill and power, all means for recovery; and there is no right to abandon until these means are used, or until it is obvious, from the nature of the loss or the circumstances attending it, that there is but little, if any, hope of success. In the case of capture, however, it is said that this is a constructive total loss, while the ship is in the hands of the captors; but liable to become only partial, if abandonment is not made till she is returned to her owners.² And if a vessel, however lost for a time, be afterwards restored to the owners, she may still be abandoned if the costs, charges, burdens, or liens upon her, springing from the loss, are sufficient in amount to make the loss total,³ but not otherwise.⁴ And it is a question for the jury

Commercial Ins. Co., 11 Johns. 9, per *Kent*, C. J.; *Howland v. Marine Ins. Co.*, 2 Cranch, C. C. 474.

Ellicott v. Alliance Ins. Co., 14 Gray, 318.

¹ See *ante*, p. 180, notes¹ and 2.

² In *Anderson v. Royal Exch. Ass. Co.*, 7 East, 38, 42, Lord *Ellenborough*, C. J., seems to have been of the opinion that an effectual abandonment might be made of a cargo of corn, while it was under water. And in *Poole v. Protection Ins. Co.*, 14 Conn. 47, 58, it is stated that the liability of the insurers attached the moment the goods were submerged. These remarks, we think, are incorrect, and the doctrine of the text is fully supported by the case of *Sewall v. United States Ins. Co.*, 11 Pick. 90, where *Shaw*, C. J., said: "We think, therefore, it comes to this, that submersion, like stranding, or other serious disaster, is to be taken in connection with other circumstances in determining whether the loss is or is not total. These circumstances, among others, are the depth of the water, the distance from shore, the condition of the bottom, whether soft or rocky, the roughness or smoothness of the sea, the season of the year, and whether the means of relief are at hand." See

M'Iver v. Henderson, 4 M. & S. 576; *Cologan v. London Ass. Co.*, 5 M. & S. 447; *Holdsworth v. Wise*, 7 B. & C. 794; *Hamilton v. Mendes*, 2 Burr. 1198, 1209; *Messonier v. Union Ins. Co.*, 1 Nott & McC. 155. In *Dean v. Hornby*, 3 Ellis & B. 180, 24 Eng. L. & Eq. 85, a vessel insured under a time policy was captured and recaptured and sent to England. On the way, and after the risk had expired, she met with a sea peril, and was taken into port for repairs, and was there sold by the prize master. From the time of the capture, the vessel had been in the possession of the prize crew. On her arrival in England proceedings were had in the Admiralty Court, without prejudice to the legal rights of the parties, and possession was decreed to the owners. The assured abandoned after the termination of the risk, but as soon as they had intelligence of the capture; and the court held they were entitled to recover as for a total loss.

⁴ See cases *supra*, p. 180, n. 2.

in every case, whether the recapture has deprived the assured of his right to abandon.¹

In wager policies, any loss of the voyage may give the assured the right to abandon the ship,² but this is not true in respect to an interest policy. The insurance is "on the ship for the voyage," and that is an undertaking on the part of the underwriter that the ship shall, notwithstanding the perils insured against, continue physically able to perform the voyage; and the insurers do not warrant that the assured shall gain by the voyage, and it is consequently of no importance, if the voyage is given up, that it could not have been performed save at a loss, if the ship was capable of going on.³

¹ *Marine Ins. Co. of Alexandria v. Tucker*, 3 Cranch, 357.

² *Pond v. King*, 1 Wilson, 191; and cases cited in *Millar, Ins.* 314 - 323.

³ *Pole v. Fitzgerald*, Exch. Ch., Willes, 641. The jury in this case found a special verdict to the effect that the vessel was insured for four months on a cruising voyage, free from average, that the crew mutinied and carried her into port, where she was in good safety at the end of the time, and that the cruise was totally lost. Under these circumstances it was held, reversing the decision of the King's Bench, that the underwriters were not liable, on the ground that in all policies on a ship, the insurance is not on the voyage, but on the ship for the voyage. This was affirmed in the House of Lords, 4 Brown, 439. Notwithstanding the plain and forcible exposition of the law by Willes, C. J., in this case, and the affirmance of his decision by the House of Lords, Lord Mansfield in several subsequent cases seems to have paid no regard to it. See *Goss v. Withers*, 2 Burr. 683; *Hamilton v. Mendes*, 2 Burr. 1198; *Milles v. Fletcher*, 1 Doug. 231; *Manning v. Newnham*, 3 Doug. 130; *Cazalet v. St. Barbe*, 1 T. R. 187; *Rotch v. Edie*, 6

T. R. 413. Some of these cases may be supported on other grounds, and need to be referred to here only as matters of history, the law being now firmly established in accordance with the decision in *Pole v. Fitzgerald*. See *Parsons v. Scott*, 2 Taunt. 363; *Falkner v. Ritchie*, 2 M. & S. 290. In this case, Lord Ellenborough, C. J., said: "What has a loss of the voyage to do with the loss of the ship? On this subject there is so much good sense in the judgment of Willes, C. J., in *Pole v. Fitzgerald*, that it may be of great use to resort to it in order to purify the mind from these generalities." See also *Brown v. Smith*, 1 Dow, 349, 359, per Lord Eldon, Ch.; *Kemp v. Vigne*, 1 T. R. 304; *Alexander v. Baltimore Ins. Co.*, 4 Cranch, 370; *Ritchie v. United States Ins. Co.*, 5 S. & R. 501; *Oliver v. Newburyport Ins. Co.*, 3 Mass. 51; *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 401; *Church v. Marine Ins. Co.*, 1 Mason, 341; *Hurtin v. Phoenix Ins. Co.*, 1 Wash. C. C. 400; *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342, 366; *Goold v. Shaw*, 1 Johns. Ca. 293, affirmed, 2 Ib. 442.

In *Abbott v. Broome*, 1 Caines, 292, it was held that an abandonment might be made if the ship was in such a condi-

If a vessel is insured for a certain voyage which is to be performed by the terms of the contract within a certain time, it would seem that, if she is prevented from performing the voyage within the time, an abandonment might be made; but if the vessel is detained and then released, and there is sufficient time in which to finish the voyage, the assured cannot abandon.¹

As a general rule, the insured has no right to abandon on account of the fear of a loss by a peril insured against, unless that fear, by its force and intensity, be equivalent to force; and *a fortiori* he has no right if the peril be not insured against.²

The desertion of the crew is no cause for an abandonment of the voyage, if another crew can be obtained; and it is no excuse that the master had no provisions with which to feed another crew, because it is the duty of the master to obtain them.³

tion that she could not be repaired, so as to take the whole of her cargo to her port of destination. But this is inconsistent with the doctrine that the voyage and the ship are distinct subjects, and it has been decided the other way in England. *Doyle v. Dallas*, 1 Moody & R. 48, where the court decided, that, if the vessel could be repaired so as to carry any cargo, it was sufficient, and were inclined to the opinion that it was enough if she could prosecute the journey only in ballast.

¹ *Messonier v. Union Ins. Co.*, 1 Nott & McC. 155.

² See cases *ante*, vol. 1, p. 585, n. 5. In *Messonier v. Union Ins. Co.*, 1 Nott & McC. 155, a Spanish vessel, engaged in the African slave-trade, was seized by the English and restored, but she was forbidden to pursue her voyage. The captain abandoned on the ground of the fear of condemnation if he had attempted to pursue his voyage. It was held that as the British authorities had no power to condemn a Spanish vessel engaged in the slave-trade, the fear of the condemnation furnished no ground for an abandonment. The court said:

"The fear which will justify an abandonment must be a just fear, amounting to the *vis major*, illustrated by 'the fear of being made a slave or prisoner, or of perishing in a case of extremity, or where defence becomes impossible.' Emerigon, tome 1, pp. 507-512, c. 12, § 26. . . . It is a clear and well-settled principle in the law of insurance, that the fear of a loss is not the loss itself, and is no justifiable cause of abandonment. The supercargo was threatened with capture, but it was a mere threat, without any legal authority to support it. The abandonment proceeds from some other considerations with which the insurers have no concern."

³ *Messonier v. Union Ins. Co.*, 1 Nott & McC. 155. It was also urged in this case, that the voyage, which was one to procure slaves, was broken up because the only seamen who could be obtained were American seamen, who were compelled to go on board; but the court held, that there was no ground for fear of condemnation by the English court on this account, because the admiralty of one nation cannot carry into effect the laws of another, and also because

The insured must, on receiving proper intelligence, abandon (unless it is otherwise agreed), or he will be held to have elected not to abandon, and will lose the right to abandon.¹ It is said in some cases to be a question for the court to determine in each particular case, on all the evidence, whether the abandonment was made in a reasonable time,² but we apprehend the more correct rule is, that it is a mixed question of law and fact, to be determined by the jury under the direction of the court.³ We give in the note some instances where a specified time has been held a delay; but little reliance, however, can be placed on adjudged cases on this point, as they are considered on their own peculiar circumstances, and each case must be determined on its own merits.⁴ If an abandonment (when necessary) is not made in a rea-

the act of Congress imposed a penalty only on those who engaged voluntarily in the trade, and not on those who were compelled to enter into it.

¹ *Allwood v. Henckell*, per Lord Kenyon, C. J., *Park, Ins.* 239; *Roux v. Salvador*, 3 Bing. N. C. 266, 281, per Lord Abinger, C. J.; *Teasdale v. Charleston Ins. Co.*, 2 Brev. 190. See *Thwing v. Washington Ins. Co.*, 10 Gray, 443.

² *Read v. Bonham*, 3 Brod. & B. 147; *Hudson v. Harrison*, 3 Brod. & B. 97, 105.

³ *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268; *Maryland Ins. Co. v. Ruden*, *ib.* 338; *Livingston v. Maryland Ins. Co.*, 7 Cranch, 506; *Hurtin v. Phoenix Ins. Co.*, 1 Wash. C. C. 400; *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191, 193. In *Smith v. Newburyport Mar. Ins. Co.*, 4 Mass. 668, *Parsons, C. J.*, said: "What is a reasonable time must depend on facts. When the facts are agreed or found, it is a question of law."

⁴ Thus in *Savage v. Pleasants*, 5 Binn. 403, where the loss was known in February, and the abandonment made in the following May, it was held to be too late. So of an abandonment made May 21, intelligence having been received April 4. *Krumbhaar v. Marine Ins.*

Co., 1 S. & R. 281. A delay of thirty-five days was held fatal in *Barker v. Blakes*, 9 East, 283; forty-five days, *Smith v. Newburyport Ins. Co.*, 4 Mass. 668; twenty-six days, *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456, 458; nine days, *Mellish v. Andrews*, 15 East, 13; five days, the goods being insured free from average, *Hunt v. Royal Exch. Ass. Co.*, 5 M. & S. 47; eighteen days, *Aldridge v. Bell*, 1 Stark. 498. In *Mitchell v. Edie*, 1 T. R. 608, the goods insured were sold, and the owners, after waiting two or three years to get the proceeds, abandoned, the agent who had the money having become insolvent. Held that it was too late. In *Fleming v. Smith*, 1 H. of L. Ca. 513, a vessel insured on a time policy was compelled by perils of the sea to put into Mauritius. The master wrote to the owners telling of the injuries the vessel had received, and of his intention to raise money on bottomry for the purpose of making the repairs. Other letters were written, which were received between September and December, 1842. In the latter month the owners wrote, expressing their surprise at the amount required, at the same time saying that they sup-

sonable time, the insurers are not liable for a total loss, although no damage can be shown to have accrued to them by reason of the delay.¹ But the proof of the delay must be clear and positive, and it is not sufficient to show that the letter informing the insured of the loss was dated some time before he abandoned.² The reason for requiring immediate abandonment is, that the insurers should be put in a position to make the most of the salvage transferred to them, as soon as possible.

Even if it be stipulated that he shall not abandon until so many days after intelligence or proof of loss, he may still abandon at once on receiving this intelligence; and if he then hands over the papers and proof, and continues his claim, the abandonment will be valid, although he cannot claim payment any sooner than if he had delayed the abandonment;³ but if the property is restored

posed that what was done was the best that could be done under the circumstances. The repairs exceeded half the value of the vessel, and three days after the vessel arrived home the owners abandoned. Held that the abandonment was not made in time. See also *Kelly v. Walton*, 2 Campb. 155. In *Bell v. Beveridge*, 4 Dall. 272, 1 Binn. 52, note, the cargo was seized by a foreign government, and the plaintiff had notice of it in August, 1793. The yellow fever soon afterwards made its appearance, and the plaintiffs went into the country on the 10th of September, 1793, and returned November 19, and then went on a journey to South Carolina, and did not abandon till the 21st day of January, 1794. The court held that there did not appear to be any design to waive the right of abandonment, though its exercise was suspended by a public calamity, and other fortuitous circumstances. Although the assured might be excused from exercising his right of abandonment during the epidemic, yet the subsequent delay seems hardly justifiable. See also *M'Calmont v. Murgatroyd*, 3 Yeates, 27. In *Duncan v.*

Koch, J. B. Wallace, 33, there was a delay of ten days, while the papers were in the hands of a notary for the purpose of being translated and the loss adjusted, before notice was given to the underwriters; but no notice of this delay was taken by the court. In *Gardner v. Columbian Ins. Co.*, 2 Cranch, C. C. 550, the loss was known November 24. The protest and letter of abandonment were sent to the defendant December 26. The master arrived December 12, and there was no evidence of the arrival of any authentic proof prior to that date. Held that the abandonment was not too late. See also *Read v. Bonham*, 3 Brod. & B. 147.

¹ *Mellon v. Louisiana State Ins. Co.*, 17 Mart. La. 563.

² *Marine Ins. Co. of Alexandria v. Tucker*, 3 Cranch, 357.

³ *Livingston v. Maryland Ins. Co.*, 6 Cranch, 274, 7 Cranch, 506. In *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, the policy contained the following clause: "It is hereby agreed that the insured shall not abandon to the insurers until sixty days have elapsed after having given notice to them of his intention

before the expiration of the time, the right to abandon is gone.¹ Where a policy contained a clause warranting not to abandon in case of capture or detention until six months after notice thereof given to the insurers, it was held that if the vessel was condemned the assured could abandon immediately.²

The abandonment may be made on any actual information, however it be derived, if it be worthy of trust and credit; and might even be made, under some circumstances, upon a general rumor and belief;³ but it should not be made on mere conjecture or possibility.⁴ And if the first intelligence received be not such as ought to be trusted and received as authentic, the insured has a right to wait until he receives more certain intelligence.⁵ It

so to do, and of the loss or event which may entitle the insured thereto." It was held that the party might abandon at any time, the abandonment taking effect at the expiration of the sixty days. See also *Loving v. Mercantile Ins. Co.*, 12 Pick. 348; *Clarkson v. Phoenix Ins. Co.*, 9 Johns. 1.

¹ *Dorr v. Union Ins. Co.*, 8 Mass. 502; *Delano v. Bedford Mar. Ins. Co.*, 10 Mass. 347. See *Law v. Goddard*, 12 Mass. 112.

² *Ogden v. Columbian Ins. Co.*, 10 Johns. 273.

³ In *Muir v. United Ins. Co.*, 1 Caines, 49, it was doubted whether an abandonment could be made upon newspaper information.

⁴ In *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 450, it was held that since the abandonment must state the cause of the loss, it is necessary that not only the existing facts should constitute a total loss, but also that the assured should be informed of the accident which occasioned it, and that he cannot therefore abandon upon the apprehension that a loss has taken place, and afterwards establish his right to do so by facts that subsequently come to his knowledge. The language of Lord *Ellenborough*,

however, in *Brainbridge v. Neilson*, 1 Campb. 237, 10 East, 329, 341, shows that that learned judge considered the law to be that the insured might abandon upon any intelligence whatsoever, and his right to recover depended merely upon the truth or falsehood of such information.

⁵ *Gardner v. Columbian Ins. Co.*, 2 Cranch, C. C. 550. In *Duncan v. Koch*, J. B. Wallace, 33, 45, *Griffith*, J., said: "In cases of this kind it is difficult to propose a rule by which to determine what shall be notice of a loss to the assured; much must depend on circumstances. If the loss be well authenticated or well known, immediate dereliction should be tendered by the assured. If not certainly known, but from strong evidence fully believed, and he suspends his option with a view to avail himself of some favorable contingency for the disposition of the property insured on his own account, this might, if the loss had in fact happened, (though I do not say it would,) turn the property upon him, at its full or supposed value. But such intent must certainly be proved, and clearly proved, not inferred from slight circumstances, or from the probability that such would

would, however, be dangerous to press this too far; for the rule — as illustrated by its reason — must be, that if the intelligence or information be such as might call upon the insurers to take at once any precautionary measures, or any incipient steps towards the recovery of the salvage, they must be entitled to the information, because they may be prejudiced by the withholding of it. So, if the effects of the peril or loss are not yet ascertained, or if efforts are making for the recovery of the vessel, there may be some delay for these reasons; because after abandonment the property belongs to the insurers, and the insured might discontinue efforts to save that which was no longer theirs; and it is for the interest of the insurers that such efforts should be made.¹

It is said in some American cases, that the abandonment may be made at any time, so long as the loss continues to be total.²

naturally be a motive with the assured for delaying a surrender to the underwriters."

¹ In *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191, 193, *Shaw, C. J.*, instructed the jury in a case where a vessel was stranded and the assured did not abandon till eleven days afterwards, that if they were satisfied that upon the first information the assured were in a state of uncertainty as to the actual condition of the vessel, and waited a few days for more definite information, and not with a view to speculate upon chances, if the vessel was stranded and not bilged, and if the length of time she remained ashore had increased the probability that she could not be got off, and the loss continued total at the time of the abandonment, there were circumstances tending to show that the abandonment was made within a reasonable time. These instructions were held to be correct by the full court. And in *Gernon v. Royal Exch. Ass. Co.*, 6 Taunt. 383, where an abandonment was delayed in order that the condition of a damaged cargo of sugars might be ascertained, *Gibbs, C. J.*,

delivering the opinion of the court, after stating the general rule to be that the assured must elect in the first instance whether he would consider the loss total or partial, said: "The first instance means, after the assured has had a convenient opportunity of examining into the circumstances which render abandonment expedient or otherwise; because it is on the result of that examination that he is to make up his mind, whether he will abandon or not. Let it not be supposed that I accede to the proposition, that the assured may use this latitude as an opportunity to judge of the state of the markets, and, as the markets fall and rise, to elect whether he will abandon or not abandon. He has no right to govern his conduct by any such rule. The only examination he may make is into the actual state of the cargo, to ascertain what is the degree of damage, without reference to the state of the markets. See also *Teasdale v. Charleston Ins. Co.*, 2 Brev. 190; *Anderson v. Royal Exch. Ass. Co.*, 7 East, 38.

² *Brown v. Phoenix Ins. Co.*, and *Montgomery v. United States Ins. Co.*,⁴

This, however, must mean so long as the loss continues *actually* total, as by capture and condemnation. But even here it is difficult to see what reason or equity there can be in any other rule than that, if an abandonment be unnecessary, it is no matter when it is made, because it need not be made at all. But if it must be made for the purpose of transferring salvage, it should be made at once, that the insurers may be able to derive the utmost advantage from it. At all events, it must be certain that there can be no delay which does not destroy the right of abandonment, if such delay prejudice or impair the rights of the insurers to indemnify themselves by the salvage, to the utmost practicable extent.

Even, however, if the insured has lost the right of abandonment by his delay or neglect, there are cases which indicate that he may recover that right if there be some new, additional, independent, and materially injurious effect of a peril insured against. It is perhaps on some ground like this, that, in case of capture, it has been held that the assured need not abandon as soon as he hears of the detention, but may wait till the vessel is condemned, and then, without taking an appeal, abandon; but we think the cases so deciding are far from satisfactory.¹

Binn. 445; *Roget v. Thurston*, 2 Johns. Ca. 248; *Lawrence v. Sebor*, 2 Caines, 203; *Steinbach v. Columbian Ins. Co.*, 2 Caines, 129, 132, where an abandonment fifteen months after seizure was held to be good. In *Tom v. Smith*, 3 Caines, 245, it was held that this rule did not apply where the assured had treated the loss as partial. In *Livermore v. Newburyport Mar. Ins. Co.*, 1 Mass. 264, 277, it was held that in case of capture, as well as in any other case of constructive total loss, a seasonable abandonment must be made, and it is not enough that the loss continues to be total. *Sewall, J.*, in speaking of the passage from Marshall which seems to support the rule contended for, said: "The rule respecting the manner of exercising that right is too well established to be shaken, or rendered in any

degree doubtful, by the mere statement of an author, without any adjudged case to support it." But see the dictum of the same learned judge in *Dorr v. New England Ins. Co.*, 11 Mass. 1, 5.

¹ There seems to be some misapprehension as to the effect of the authorities on this subject. Mr. *Arnould* states it to be the established English doctrine that no abandonment can be made in case of condemnation, but that the assured should abandon on receiving intelligence of the seizure. 2 *Arnould*, Ins. 1166, citing *Mullet v. Shedden*, 13 East, 304; *Mellish v. Andrews*, 15 East, 13. In the former case the cargo insured was seized and condemned, and taken out of the vessel and sold. No abandonment was made until after the news of the condemnation and sale arrived. An appeal was taken, and the

SECTION IX. — *Of Revocation of Abandonment.*

WE have seen that no person insured need abandon, unless he chooses to; but, if he does so, he tenders thereby an absolute

decree of condemnation reversed, the seizure being held to be illegal. Lord *Ellenborough* said: "If instead of the salt-petre having been taken out of the ship and sold, and the property devested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought there was much in the argument, that, in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away." So in *Mellish v. Andrews*, 15 East, 13, where, subsequent to the abandonment, which was not made in a reasonable time after notice of the vessel being seized, the cargo was unladen by a military force acting under the orders of a foreign government, and was never restored, it was held that no abandonment was necessary, and the question whether an abandonment could be made was not decided. The case of *Kelly v. Walton*, 2 Campb. 155, is cited by Mr. *Phillips*, § 1669, to the point that a subsequent abandonment may be made if the detention continues so long that it is of no use to pursue the adventure. The insurance in this case was on a cargo of flax-seed from the United States to a port in Ireland. The vessel was detained by an embargo, information of which was received February 11, 1808, but no abandonment was made till the 11th of June following. It was proved,

by an Irish statute, that no flax-seed can be sold for sowing, unless that of the growth of the preceding year, and that the sowing season commenced in March and ended on the 10th of May. It was accordingly insisted that the plaintiff had a right to wait while there was a possibility of its arriving in time, and afterwards to abandon. Lord *Ellenborough* held that the right to abandon on account of the detention was gone on the insured's not abandoning at first, and that, if it had revived by the new state of circumstances, yet it had not been exercised in time.

In *Dorr v. Union Ins. Co.*, 8 Mass. 494, where a vessel was seized for a cause which the assured knew did not in fact exist, it was held that an abandonment, made on intelligence being received of the condemnation, was in sufficient time. The same point was determined in *Dorr v. New England Ins. Co.*, 11 Mass. 1, which differed from the case against the Union Insurance Co., in the fact that the policy, which was on time, had expired before the condemnation took place, but the court held that this made no difference. In many cases in this country the courts seem to proceed on the ground that the assured can in any case, and for any purpose, wait till the condemnation, and then abandon. *Earl v. Shaw*, 1 Johns. Ca. 313; *Bohlen v. Delaware Ins. Co.*, 4 Binn. 430; *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. 159, 221. And in *Mey v. Tunno*, 2 Bay, 307, it was held that he might abandon if the vessel was ordered to be released by the

transfer to the insurers; and if they accept—expressly or by implication—this makes the transfer irrevocable.¹ The insurers may waive their right; they may consent to the revocation of the abandonment; and this also they may do expressly or by implication. In like manner, the insured acquires by his abandonment certain rights of which he cannot be divested against his will; but he may waive these also, and he may do this either expressly or by implication of law.

If a sale is made by a Court of Admiralty having jurisdiction over the subject, it seems that the mere fact that the master purchased the vessel would not affect the right of the assured to claim as for a total loss.² But if the sale is made by the master

court, but required to give bonds to abide an appeal by the captors. But in *Smith v. Delaware Ins. Co.*, 3 Wash. C. C. 127, it was held that if an abandonment is delayed to take the chance of an acquittal, and to speculate upon the high market for the goods, the delay is fatal. See also *Calbreath v. Gracy*, 1 Wash. C. C. 219.

We are very much inclined to doubt the rule that the mere continuance of a peril, or the aggravated result of the peril, should give the assured the subsequent right of abandonment. It is true that on the occurrence of a peril the assured need not abandon, but may exercise that right if another independent peril occur; but we should be inclined to limit it to this, and to deny him the right when the final loss was a consequence of the peril, more especially when there was a probability of its taking place.

¹ See *ante*, p. 177.

² One of the earliest cases on this subject is *Welman v. Gray*, Sup. Jud. Court, Mass., Nov. T. 1799, 2 Dane, Ab. ch. 40, art. 7, § 14. The vessel was captured by a privateer, condemned and sold at public auction, and was bought by *Welman*, who was the owner and master. Mr. Dane says: "There was

no doubt but that the property was changed; but it was urged by the defendant, that the master abroad is agent for the owners or underwriters, as the case may be, and that, if he buy the vessel after condemnation, she shall be considered as recovered, and only an average loss paid. The court held, that *Welman* purchased for himself; and if a recovery, there was no change of property; had the owner confirmed the master's purchase, it had only been a partial loss." Although the final language of the above expression is ambiguous, yet we think the case decides that where the master and owner are the same person, and the master buys the vessel at a sale under a decree of the Court of Admiralty, this is considered as a purchase by him as owner, and the underwriters are only liable as for a partial loss.

In *Storer v. Gray*, 2 Mass. 565, the vessel was captured and recaptured, and sold by the Court of Admiralty to pay salvage. The vessel was bought by the master, and by him delivered over to the former owners. They did not abandon, but offered to credit the defendants with the proceeds of the sale. The court held the loss to be total, on the ground, as stated by *Sewall, J.*, in *Oliver v. Newburyport Marine Ins. Co.*, 3 Mass.

himself,¹ or by the decree of any tribunal which has no authority to order a sale,² or even by the Court of Admiralty, if at the instigation of the master,³ and the master purchases the vessel for the benefit of the owners and they afterwards exercise any act of ownership over it, the abandonment will be considered as waived.⁴

37, 53, that the decree changed the property, that the master might purchase for himself, and make a present of the vessel or sell it to the assured, and that they then took it by a new title. So, in *Sawyer v. Maine F. & M. Ins. Co.*, 12 Mass. 291, it was held that where a master, in such a case, bought a vessel on his own account without any previous authority or posterior assent on the part of the owners, they were entitled to recover for a total loss. In *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. 159, 231, it was held, that, where a vessel is condemned, the assured is divested of all property in her, and may purchase her, and hold her as purchaser against all the world, except the underwriters, and the latter must elect, within a reasonable time, whether to accept or not. If they decline to accept the abandonment, this is considered as a waiver of their right to object to the validity of the sale. But in some cases no distinction is taken between a sale by a decree of a Court of Admiralty and a sale by the master, and in either case it has been held that the owner, if he afterwards received the property and exercised acts of ownership over it, waived his right to recover for a total loss. *Saidler v. Church*, cited 1 Caines, 297, note; *Queen v. Union Ins. Co.*, 2 Wash. C. C. 331.

¹ In *Story v. Strettell*, 1 Dall. 10, the vessel was sold by an agreement between the captain and persons who had recaptured the vessel. The captain

bought her for the owners, who afterwards acquiesced in the sale, and the loss was held to be but partial.

² *M'Masters v. Shoolbred*, 1 Esp. 237; *Wilson v. Forster*, 6 Taunt. 25.

³ *Oliver v. Newburyport Marine Ins. Co.*, 3 Mass. 37; *Abbott v. Broome*, 1 Caines, 292.

⁴ Thus, if the owners fit out the vessel and send her on a new voyage, their right of abandonment is gone. *Saidler v. Church*, cited 1 Caines, 297, note. In *Abbott v. Broome*, 1 Caines, 292, the supercargo, who was also the part owner, became the purchaser of the vessel, on account of the owners, at a port of distress, and took the vessel to her home port, where she was sold by the plaintiff without the consent of the underwriter. Held, that the plaintiff, under the circumstances of the case, had abandoned the vessel while the loss continued total, and that the act of sale was not a waiver of the abandonment; because, as the underwriter refused to accept the abandonment, the plaintiff was justified, having possession of the vessel, in selling her on account of whom it might concern. So held also in *Walden v. Phoenix Ins. Co.*, 5 Johns. 310; *Livingston v. Hastie*, 3 Johns. Ca. 293. But it has been held in England, that, if the master buys the vessel on account of the owners, they cannot refuse to accept it and thus make the loss total. *Wilson v. Forster*, 6 Taunt. 25, 1 Marsh. 425. And in New York the court decided that if the owner sold as trustee of the

A sale, even by the owner himself, if justified by the circumstances, and having no purpose in view but that of saving the remaining property, as salvage for the insurers, from utter destruction, would not take from him any rights acquired by abandonment; and although he acted and gave title to the ship in his own name, it would be supposed that he acted as the agent of the insurers.¹ It would be necessary, however, in order to make such a transaction correct and compatible with a valid abandonment, that the owner and insured should either have consulted the insurers and obtained their directions, or else be in a situation where he could not consult them, and could save their property by no other means than by an immediate sale. But it has been held that if, after an abandonment, the vessel is sold by the agents of the underwriters at a public sale, the former owner may become a purchaser without waiving his abandonment.² Generally

underwriter, he could not buy the vessel himself. *Ogden v. New York Fire Ins. Co.*, 10 Johns. 177, 12 Johns. 25.

And, generally, if the owner of the vessel or cargo buys it at a sale made by the master, he cannot claim a total loss. *Robertson v. Western Marine and F. Ins. Co.*, 19 La. 227. In this case the court observed: "This rule is said to be founded in sound policy, to prevent fraudulent speculations upon a loss, at the expense of the insurer. It rests also on the broad and well-known principle, that a trustee cannot become the purchaser of the estate of his *cestui que trust*. After an abandonment the insured becomes the agent of the insurers, and, standing in that relation, he cannot purchase, except with the consent of his principals. If he does, and the purchase is not sanctioned by the insurers, the abandonment is waived and annulled." See also *Vaughan v. Western Marine & F. Ins. Co.*, 19 La. 54.

In considering whether the assured has a right to refuse to accept the vessel when bought by the master, the question as to the time when the aban-

donment was made may be important. If it is made while the loss continues total, it relates back to the time of the disaster, and the master is then the agent of the underwriters, and acts for them, so that the assured in such a case may well refuse to receive back the vessel when it is bought by the master. But if the assured, at the time of the sale, continued to be owner, it may be that a purchase by the master would be for his benefit. See *Chamberlain v. Harrod*, 5 Greenl. 420; *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268; *Columbian Ins. Co. v. Ashby*, 4 Pet. 139.

¹ See cases cited in the preceding note, also *Brown v. Smith*, 1 Dow, P. C. 349; *Catlett v. Pacific Ins. Co.*, 1 Wend. 561, 1 Paine, C. C. 594. This principle would prevent the prosecution of a voyage after an abandonment from being necessarily considered as a waiver of the abandonment. *Parker v. Towers*, 2 Browne, App. 80.

² *King v. Middletown Ins. Co.*, 1 Conn. 184. But if the insured, acting as such agent, sells the vessel, he waives his abandonment by acting as purchaser.

speaking, if an owner of a ship after abandonment still keeps his ship in his hands, and repairs the injury, it will be regarded as a virtual waiver of his abandonment.¹

If insurance is effected in the name of A, for the benefit of whom it may concern, although perhaps A may have the right to abandon, and may be treated as the agent of the insured, yet they may disavow his acts. So, if a mortgagee is insured under such general terms, and the mortgagor, the nominal insured, abandons, and the mortgagee takes possession and sells the vessel, this is a repudiation of the abandonment.²

It has recently been held in New York, that while a common carrier may, by contract with the owners, secure to himself, in case of damage or loss of the goods, for which the carrier would be liable, the benefit of any insurance to be effected by the owner, an abandonment by the owners to the insurers against marine perils, of goods damaged during their transportation, under such a contract, does not give to the insurers any right of action against the carrier.³

SECTION X. — *Of the Effect of an Abandonment.*

It is a universal rule, that all rights, claims, and interests, which are indissolubly connected with the property insured, pass to the insurers by an abandonment of the property,⁴ so far as the same belonged to the assured and to the extent of the interest covered by the policy;⁵ as right to contribution for general

Ogden v. New York Fire Ins. Co., 10 Johns. 177, 12 Johns. 25.

¹ See *ante*, p. 140, n. 3.

² Marine Dock & Mutual Ins. Co. v. Goodman, Chancery Ct., Mobile, Ala. 4 Am. Law Register, 481.

³ Merc. Mar. Ins. Co. v. Calebs, 20 N. Y. 173. This case is also cited, *post*, in chapter on Action.

⁴ The owners of the vessel, therefore, after they have abandoned her, have no right of action against a person claiming to hold the vessel as vendee, under a sale by the master. Hooper v. Whitney, 19 La. 267.

⁵ In Rice v. Cobb, 9 Cush. 302, the

owner of a vessel mortgaged one half of her to one person, and subsequently mortgaged the whole to another person subject to the lien of the first. The last mortgagee insured his interest, and, on a loss taking place, abandoned the vessel to the insurers. It was held, that only the interest of the insured passed, and that the first mortgagee was entitled to one half the salvage. See also Phillips v. St. Louis Perpet. Ins. Co., 11 La. Ann. 459.

In Merchants & Manufacturers' Ins. Co. v. Duffield, 2 Handy, 122, 4 Am. Law Register, 662; and in Cincinnati Ins. Co. v. Duffield, 6 Ohio State, 200,

average;¹ all claims for negligence or any misconduct causing injury to the property, as for collision,² or for injury to goods;³ or for any indemnity from a foreign government.⁴ And the same rule applies where the government of the country to which the parties belong grants letters of reprisal to obtain satisfaction from a foreign government for illegal captures: the underwriters who have paid for losses occasioned by such captures are entitled to the benefit of the fund accruing from the reprisal.⁵ And if a ship is

three fourths of a steamboat were insured. She was afterwards sunk and abandoned. The underwriters raised the vessel and realized from the wreck, after deducting expenses, the sum of three thousand dollars. The policy contained this clause: "In all cases of abandonment, the assured shall assign, transfer, and set over to said insurance company all their interest in and to the said steamboat, and every part thereof free of all claims and charges whatever." It was held, that the abandonment transferred only the interest of the assured, so far as it was covered by the policy, and that the insured were entitled to recover one fourth part of the proceeds of the wreck. But see *Cincinnati Ins. Co. v. Bakewell*, 4 B. Mon. 541, 544.

¹ *Sturgess v. Cary*, 2 Curtis, C. C. 59; *Walker v. United States Ins. Co.*, 11 S. & R. 61.

² See *Yates v. Whyte*, 4 Bing. N. C. 272, where it was held that the party in fault was liable for all the damage done, and could not deduct the sum which the injured party had received from the underwriters. This case proceeded on the ground that the plaintiff would be considered as the trustee of the underwriters, although he brought the action in his own name, and on his own behalf.

³ *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285. The case of *Church v. Shelton*, 2 Curtis, C. C. 271, was brought by an insurance company in the name

of the shipper, though this fact does not appear in the report of the case. And in *Garrison v. Memphis Ins. Co.*, 19 How. 312, the underwriters who had paid for a loss by fire were held to be subrogated to the rights of the insured to recover from the carriers, in whose possession the goods were burned.

In *Mellon v. Bucks*, 17 Mart. La. 371, the action was brought by the shipper of goods against the owners of the vessel, and the insurance company, in which the vessel and freight and the plaintiff's goods were insured, was summoned as trustee. The plaintiff had abandoned the goods, but the abandonment was not accepted, and the insurers had not exercised any acts of ownership over the goods. It was held, that by the abandonment the title to the property passed to the underwriters, and that the plaintiff could not maintain this action, as it could not be considered a suit for the benefit of the underwriters, since the plaintiff sought, by summoning them as trustees, to take the money out of their hands.

⁴ *Comegys v. Vasse*, 1 Pet. 193; *Russell v. Union Ins. Co.*, 4 Dall. 421, per *Washington, J.*; *Gracie v. New York Ins. Co.*, 8 Johns. 237. And in *Rogers v. Hosack*, 18 Wend. 319, it was held that the *spes recuperandi* passed by the abandonment, although the loss had not been actually paid by the underwriters.

⁵ *Randal v. Cockran*, 1 Ves. Sen. 98.

abandoned, pending freight passes to the insurers.¹ But if the owner of the ship is also owner of the cargo, he is not liable to the insurers for freight, except so far as his goods are benefited by the ship after the abandonment is made.² But if the underwriters refuse to accept the abandonment, and the loss is settled by a compromise, the right of claiming indemnity does not pass.³ So, if no abandonment is made, but the loss is settled as a partial loss, the underwriters have no claim on the insured for any subsequent benefit derived from the adventure.⁴ So, too, we should say, on the prevailing authorities and what seems to us the reason of the case, that a mortgagee must transfer to the insurers by abandonment so much of the debt due to him as is paid by the insurers.⁵ An action at law to enforce a right which the insurer has acquired by subrogation must, generally, be in the name of the party whose place the insurer has taken.⁶

The salvage, of course, belongs to the insurers; but if it be encumbered by any charge or lien by a peril against which they have insured, they are of course answerable for this, and bear the loss. But if the salvage have burdens, charges, or liens upon it springing from perils which are not insured against, this must be the loss of the insured, who must discharge these burdens, or pay or allow to the insurers the sum they pay, or are bound to pay, by reason of these burdens.⁷ They take the ship by this abandonment free from any lien of seamen's wages earned before the time from which the abandonment takes effect,⁸ but are, of course, liable for wages earned afterwards, by labor on board the ship, because this is a service rendered to them, and in and about their property.⁹

¹ *Scottish Mar. Ins. Co. v. Turner*, 4 H. & L. Ca. 310, n., 20 Eng. L. & Eq. 24.

² *Miller v. Woodfall*, 8 Ell. & Bl. 493.

³ *Brooks v. Mac Donnell*, 1 Younge & C., Exch. 500; *New York Ins. Co. v. Roalet*, 24 Wend. 505.

⁴ *Tunno v. Edwards*, 12 East, 488; *Goldsmid v. Gillies*, 4 Taunt. 803.

⁵ See *ante*, vol. 1, pp. 226-229.

⁶ *London Ass. Co. v. Sainsbury*, 3 Doug. 245; *Rockingham Mutual F. Ins. Co. v. Bosher*, 39 Maine, 253. In equity, however, the insurer may sue in his

own name. *Garrison v. Memphis Ins. Co.*, 19 How. 312; and so he may in admiralty.

⁷ See cases *ante*, p. 119, n. 1.

⁸ In *Frothingham v. Prince*, 3 Mass. 563, it appears to be held, that, if the owners pay the wages of the seamen, they can look to the underwriters to reimburse them if there is any salvage from the wreck. But this decision, we think, is not sustained. See *The Two Catharines*, 2 Mason, 219, 1 Newb. 341.

⁹ In England it does not appear distinctly whether freight pending at the

We have seen, that the insurers take the salvage property subject to the charges and expenses incurred in saving it; and it seems, that this may exceed the value of the salvage, and still the insurers be bound, provided the expenses and charges were incurred by the insured while laboring in good faith and with reasonable discretion for the recovery and security of the salvage and the consequent benefit of the insurers; for this they are authorized, if not required to do, by the usual policies of insurance, and would be, we think, by the principles and policy of the law of insurance, even if the policies contained no such provisions.¹

If the insurers interpose and refuse to accept the salvage, and distinctly request that no more expenses be incurred on account of it, then the insured can no longer incur such expenses at their risk; there would seem to be, however, this qualification to this last rule, namely, that the prohibition must not be wanton and tending to expose property to unnecessary destruction, but must be made at least in good faith, and with some show of reason.²

time of the loss passes to the underwriter on freight or to the underwriter on the ship. It may, therefore, be a question whether the underwriter on the ship is liable for wages earned subsequent to the loss, as these should be a charge on the freight. But, in this country, where the law is well settled, that subsequent freight passes by the abandonment of the ship, the underwriters are clearly liable for wages subsequently earned. *Hammond v. Essex F. & M. Ins. Co.*, 4 Mason, 196. The voyage in this case had been pursued with the assent of the underwriters, and they had received the freight earned. In *M'Bride v. Marine Ins. Co.*, 7 Johns. 431, the vessel was abandoned on account of being detained by an embargo, but the abandonment was not accepted. It was held that the owner of the vessel, as the abandonment was not accepted, should have laid her up and discharged the crew; and, as this was not done, it was held that the underwriters were not liable.

¹ *Barker v. Phoenix Ins. Co.*, 8 Johns. 307; *Jumel v. Marine Ins. Co.*, 7 Johns. 412; *Lawrence v. Van Horne*, 1 Caines, 276; *Potter v. Providence Washington Ins. Co.*, 4 Mason, 298; *Le Cheminant v. Pearson*, 4 Taunt. 367.

² *Phillips v. St. Louis Perpetual Ins. Co.*, 11 La. Ann. 459. In *Gould v. Citizens' Ins. Co.*, 13 Mo. 524, the underwriters refused to accept the abandonment, and afterwards compromised the claim. It was held, that they were, nevertheless, liable on a contract made by the master with a third party to save as much of the wreck as he could at a certain rate per cent of salvage. If the vessel is captured, and the master, after an abandonment, acting as the agent of the underwriters, makes a compromise with the captors, the underwriters are obliged to pay as for a total loss, but are entitled to the benefit of the compromise. *Jumel v. Marine Ins. Co.*, 7 Johns. 412. And in *Miller v. De Peyster*, 2 Caines, 301, the same

Generally, if the abandonment be valid, the property is thereafter at the risk of the insurers, who must be liable for the acts of those employed upon it, so far, at least, that any loss caused by these persons is their loss. The master and crew become by abandonment the agents or servants of the insurers for this purpose; and as the insurers bear the risk of their conduct,¹ so they are entitled to all the benefit which may arise from it; and even after condemnation by a prize court, the master or whoever is in

rule was laid down in a case, where the compromise was made by a person appointed by the master to look after the property insured.

In *Lawrence v. New Bedford Comm. Ins. Co.*, 2 Story, 471, the jury found that there was a total loss of the property insured at an intermediate port, and the question was as to the effect to be given to the acts of the master in respect to the salvage. The master remained at the intermediate port for four months, to take charge of the property, a cargo of oil, and then sold part of it and shipped the remainder to New York, via Rio Janeiro. He embarked with it, and at Rio caused it to be unladen and sold, and the proceeds invested in coffee, which was carried to New York and there sold with the consent of the underwriters. The coffee was somewhat damaged on the voyage. It was held, that the captain's necessary expenses at the intermediate port, in taking care of the property insured, and until its shipment on board the vessel, together with a reasonable compensation for his services, were a charge on the underwriters; and that they would be liable for the price of his passage to New York, if his accompanying the oil was a reasonable and prudent act for the benefit of the underwriters. In regard to the sale at Rio, the court held, that generally the master has not the right to dispose of the property and to

invest the proceeds in another adventure. There must either be a necessity for it, or it must be, with reference to the voyage and the nature of the property, in a very high degree expedient.

¹ In *Lawrence v. New Bedford Comm. Ins. Co.*, 2 Story, 471, cited in note, *supra*, Mr. Justice Story said, assuming the sale of the salvage not to have been necessary: "If it turns out to be advantageous to the parties interested, and they adopt the acts of the master, and receive the property without reserve or objection, that will amount to a ratification, and they must then take the property or its proceeds *cum onere*. If, on the other hand, they receive the property, or its proceeds, reserving all their rights, and waiving no objections, then they are entitled to receive the proceeds without any charges upon them, if the proceeds do not yield a profit to them beyond the fair value of the property shipped, and so improperly converted as it would have been on its arrival at the original port of destination. But if a profit ultra such value has come to the hands of the underwriters, by reason of the new investment, then I think, that if the master has acted without fraud, and under a mere mistake of judgment, he ought to be entitled, out of those profits, to receive his reasonable expenses, and also a reasonable compensation for his services, not exceeding those profits."

charge of the property remains so far the agent of the insurers, that if he purchases the property at the sale, avowedly for himself, the insurers may adopt the purchase as made for them by their agent.¹ So too, the owner of the property becomes by the abandonment the agent and trustee of the underwriters, so far, that it is his unquestionable duty to do all that he reasonably can for the preservation of the property and its safe arrival into the hands of the insurers.² But the insurers cannot be made liable to him, or liable to lose in an adjustment with him, for mistaken or wrongful acts committed by himself. They might be thus liable for the acts of a person expressly and in good faith made agent of the insurers for the property by the insured;³ but they would not be, as it seems, for the acts of one who was acting as the agent of the insurers by reason of his previous relation to the insured, as factor, consignee, or master; for if the property is lost by his fraud, the owner must allow or account for it in the same way as if it had been lost by his own act; for as to these he will be considered as the agent of the insured.⁴

¹ *United Ins. Co. v. Robinson*, 2 Caines, 280. In this case insurance was effected on goods. The vessel was captured and carried into Malaga, where the consignees purchased the cargo from the captors for \$15,565, and afterwards sold it for \$30,174, and invested the proceeds in wines and brandies which they shipped on the account and risk of the defendants, who received the goods and claimed to retain possession of them, notwithstanding they had, on notice of the capture, made an abandonment to the insurers which had been accepted. The consignees testified that they acted as agents of the defendants, and should have looked to them in case of loss. The court held, that by the abandonment the underwriters had the right to adopt the acts of the consignees, and, having done so, were entitled to the proceeds of the goods which the defendants had sold. This case was affirmed

on appeal. *Robinson v. United Ins. Co.*, 1 Johns. 592.

² *Curcier v. Philadelphia Ins. Co.*, 5 S. & R. 113, 116, per *Tilghman*, C. J.

³ *Miller v. De Peyster*, 2 Caines, 301; *Gardiner v. Smith*, 1 Johns. Ca. 141.

⁴ *Smith v. Touro*, 14 Mass. 112. In this case the vessel was insured from Havana to Boston or port of discharge in the United States not blockaded. The policy contained a clause, that in case of capture the assured should claim and prosecute for the property until acquittal, or condemnation in a high court of admiralty, the underwriters' and assured agreeing to pay their proportion of expenses in such a case. The vessel was captured and taken into Halifax and abandoned, but was subsequently restored to the master, who represented himself as the Spanish owner, and he then took a cargo to the West Indies without the authority of the real owner or of the underwriters; and converted

The general rule is, that the abandonment relates back to the time of the loss ; but it would seem that, though the underwriters would be liable for the acts of the master, or any other person having the possession and control of the property during the time intervening between the loss and the abandonment, provided such acts were *bona fide*,¹ yet they are not liable for the fraudulent acts of such agent, until the abandonment takes effect.²

The clause rendering it lawful and necessary for the master to labor in behalf of the property imposes no additional obligation upon him, and his acts cannot affect the right of the insured to abandon.³ It has also been held that the abandonment of a ship by the owners to the underwriters does not operate to ratify the title of one who claims her under an unauthorized sale by the master ; and if, on a suit brought on the policy, judgment is given for the insurers, the insured are not estopped by the abandonment from claiming the vessel from one who holds her under a sale by the master which he had no right to make.⁴

the property to his own use. It was contended, that, the property having been abandoned while in the hands of the captors, the acts of the master were at the risk of the underwriters. But the court held, that as the abandonment was made while the ship was under merely a temporary restraint, and as no injury was sustained by the property, the assured could not recover for a total loss on that ground, and that the further acts of the master must be considered as done by him as agent of the insured.

¹ *Lawrence v. New Bedford Comm. Ins. Co.*, 2 Story, 471, 479. In *Gardere v. Col. Ins. Co.*, 7 Johns. 514, the neglect of the master to put in a claim for the vessel, after she was captured, seems to have been considered as the

act of an agent of the underwriters, though the vessel was not abandoned till after the condemnation.

² *Dederer v. Delaware Ins. Co.*, 2 Wash. C. C. 61.

³ Thus in *Mitchell v. Edie*, 1 T. R. 608, 613, *Ashurst, J.*, states the meaning of the clause authorizing the insured or his agent "to sue, labor, and travail, without prejudice to the insurance," to be, "that till the assured have been informed of what has happened, and have had an opportunity of exercising their own judgment, no act done by the master shall prejudice their right of abandonment." See also *Cincinnati Ins. Co. v. May*, 20 Ohio, 211 ; *Gardere v. Col. Ins. Co.*, 7 Johns. 514.

⁴ *Ward v. Peck*, 18 How. 267.

CHAPTER V.

GENERAL AVERAGE.

SECTION I. — *Of the Meaning of General Average.*

By the phrase "general average" is meant a loss of a part of the property, which is averaged upon the whole.¹ As a part of the

¹ It is strange that so much uncertainty should be expressed, not only by text-writers but by courts, as to the meaning, the limitation, and the proper use of this word "average." Its origin is not certain, nor its early meaning. We should suppose, however, that there could be no doubt as to its present meaning. Chancellor Kent says: "General, gross, or extraordinary average means a contribution made by all parties concerned towards a loss sustained by some of the parties in interest, for the benefit of all; and it is called general or gross average, because it falls upon the gross amount of ship, cargo, and freight." 3 Kent Com. (5th ed.), 232. Average here means ship damage, and not contribution, as is plain when we speak of particular average. The average of common parlance is a secondary sense of the word, derived from the practice of contribution in cases of general average. *Wimick v. Holmes*, 25 Penn. St. 371. In the United States, partial loss and average are understood by commercial men to mean the same thing, and average other than general includes every loss for which the underwriter is liable, except general average and total loss. *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 33. General average is incurred where the expenses

or losses arise in a case of emergency, not produced by the misconduct or unskilfulness of the master, and not resulting from the ordinary circumstances of the voyage. *Ross v. Ship Active*, 2 Wash. C. C. 226. General average, or general partial loss, arises from a general contribution, to which the goods of all may be subjected for the remuneration of a sacrifice incurred for the safety of all, while "particular average," or "partial loss," denotes a loss less than total, arising from a partial injury to the insured goods, or some of them, from some of the enumerated perils. *Insurance Co. v. Bland*, 9 Dana, 147. Whatever the master of a ship in distress, with the advice of his officers and sailors, deliberately resolves to do, for the preservation of the whole, in cutting away masts or cables, or in throwing goods overboard to lighten his vessel, which is what is meant by jettison or jetson, is in all places permitted to be brought into general or gross average; in which all concerned in ship, freight, and cargo are to bear an equal or proportionable part of what was so sacrificed for the common good, and it must be made good by the insurers in such proportions as they have underwritten. It was once held to be essentially neces-

law of shipping, this is one of the most ancient rules now in force in civilized countries.¹ It appears from the Rubric "*de lege Rhodia de jactu*," that it was a part of the law of Rhodes. It is in these words: "*Lege Rhodia cavetur ut si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*" "It is provided by the law of Rhodes that if a part of the cargo is thrown over for the purpose of lightening the ship, that which is given up for the benefit of all shall be compensated for by the contribution of all." This law was in force in the commerce of the Mediterranean and Adriatic Seas, more than a thousand years before the Christian era; nor can there be a better definition of the law of general average as it is in force to-day.

The right to claim average contributions is a purely maritime right, and nothing like it is sanctioned by authority in relation to land contracts, or to circumstances occurring on the land. Indeed, in Lord Coke's time, the right of claiming contribution was expressly denied under precisely the same circumstances which would give a right of contribution had they occurred at sea; and not only so, but the court declare that the same ruling should be applied to a maritime case, the rule laid down being, that where a vessel is in peril of wreck by tempest, and merchandise is cast overboard, *levandi navis causa*, every one must bear his own loss.²

sary, in order to make this jettison or sacrifice legal, that the property lost was so condemned to destruction in consequence of a deliberate and voluntary consultation held between the master and men.

1 Mag. 55. After this consultation ceased to be necessary, it was still for a considerable time usual, and regarded as proper. Now it may be said to be neither usual nor proper; indeed it very seldom takes place. Mr. Holt, in his *Treatise on Shipping*, page 482, defines the term as follows: "General average is, in a word, the common law and justice of partnership; and, defined according to its nature, is a compensation from the common stock of a sea venture in the several propor-

tions of the partners of it for the special loss or sacrifice made by one or more for the common good."

¹ Probably the earliest English case on the subject is *Hix v. Palington*, 32 Eliz., F. Moore, 297. It must have been introduced into English jurisprudence at a very early date; for in 1285 Edward I. sent to the Cinque Ports letters-patent declaring what goods were liable to contribution. See 1 Rymer *Fœdera* (3d ed.), p. 240.

² *Mouse's Case*, 12 Coke, 63. This was an action of trespass, brought by Mouse for a casket and a hundred and thirteen pounds, taken and carried away. The facts were these: The ferryman of Gravesend took forty-seven passengers, among whom was the plain-

This was no longer ago than in 1608, and it illustrates the extreme difficulty which courts of common law found in recognizing the principles of maritime law. It is true that the question of contribution did not come distinctly before the court in this case, but it is impossible to see how the court could have granted contribution under the principles asserted by them.

In our own country we have a somewhat remarkable case occurring in Michigan.¹ A steamer on Lake Huron was in danger

tiff, into his barge to pass to London. While the barge was upon the water a violent tempest arose, so that the barge was in danger of being swamped, unless, for its preservation and that of the lives of the men, a hogshhead of wine and other ponderous things were cast out. It was proved that these things were ejected *levandi causa*, some by one passenger and some by another. It was held, *per totam curiam*, that, it being a case of necessity, for the saving of the lives of the passengers, the defendant, being a passenger, was justified in casting the casket of the plaintiff out of the barge, with the other things in it, and the plaintiff was accordingly nonsuit. It was also held, that although the ferryman surcharged the barge, yet, for the safety of the lives of the passengers in such a time and accident of necessity, it was lawful for any passenger to cast the things out of the barge; and that the owners should have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if there was no surcharge, and the danger accrued only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safety and life of a man; for *interest reipublicæ quod homines conserventur*, 8 Ed. 4, 23, etc., 12 H. 8, 15; 28 H. 8; Dyer, 36, plucking down of a house in time of fire, etc., and this *pro bono publico*; *et conservatio vitæ hominis*

est bonum publicum. So if a tempest arise in the sea, *levandi navis causa* and for salvation of the lives of men, it may be lawful for passengers to cast over the merchandises, etc.

¹ *Rossiter v. Chester*, 1 Doug. Mich. 154. The facts in this case were as follows: The steamer Missouri, a new and sea-worthy boat, having on board passengers and a cargo of goods, on a voyage from Buffalo to Chicago, encountered a very severe gale on Lake Huron. She was in great danger of perishing from the violence of the wind and the roughness of the waves. After long struggling with the tempest, the master and crew agreed that it was necessary to lighten her in order to save her, with her freight and passengers. Accordingly a quantity of goods were, for that purpose, thrown overboard by the crew. The boat was saved, though much injured, and returned to Detroit in safety with the residue of her cargo. It was held, that, although these facts would constitute a proper case under the maritime law for general average, the maritime law was not in force over the lakes; or, in other words, that they were not subject to admiralty jurisdiction, which is restricted to the open sea and to waters navigable therefrom as far as the tide ebbs and flows, and that the doctrine of general average was known only to the maritime law, and could not be enforced in a court of common-

of perishing from a tempest; she was lightened by the jettison of a part of the cargo, and the ship, with the residue of the cargo,

law jurisdiction. Speaking of the difficulties that would attend the attempt to enforce a claim for contribution in a court of common law, the court said: "Another insuperable objection to the jurisdiction of courts of common law in questions of average arises from the fact that it would be exceedingly difficult for such tribunals to adjust the interest which is involved in the common calamity. The parties interested in the proceedings may be five or five hundred. The owners of the ship and the freight and the cargo have each a separate and often adverse interest to each other, and it may be readily imagined what embarrassment would necessarily follow an adjustment of such adverse interests in a court of law. Mr. Justice Story (1 Story on Eq. § 491) presents in a strong light the objections to such an assumption of jurisdiction. He says that, 'in a proceeding at the common law every party having a sole and distinct interest must be separately sued; and as the verdict and judgment in one case would not only not be conclusive but not even be admissible evidence in another suit, as *res inter alios acta*; and as the amount to be recovered must in each case depend upon the value of all the interests to be affected, which of course might be differently estimated by different juries, it is manifest that the grossest injustice or the most oppressive litigation might take place in all cases of average on board of general ships.' These difficulties are all obviated by a recourse to those courts whose proceedings are regulated by the course of the civil law. The simplicity and equity of the rules which prevail in such tribunals render them eminently

safe, convenient, and expeditious in cases of this nature." But upon the objections here urged, Lord Kenyon, in the earlier case of *Birkley v. Presgrave*, 1 East, 220, which was an action by the ship-owner to recover from the owner of the cargo his proportion of a general-average loss, incurred by sacrificing the ship's tackle for an unusual purpose for the common benefit, said: "Here the only difficulty pretended is the ascertainment of the proportion to be paid of the general loss in each particular case; and since it is admitted that this may be ascertained in equity, there seems to be no reason why, if it can be ascertained without recourse to equity, an action should not lie to recover it at law. But it is objected that this will lead to a multiplicity of actions. . . . The objection is of no weight in a case like the present. The same inconvenience would exist if there were many persons owners of different parts of a cargo, and an injury were to happen to the whole from the misconduct of the captain; they must all bring their several actions for their respective losses, and no objection could be made to their recovery. Upon the whole, this action, the grounds and nature of which are fully set out in the special count, is founded in the common principles of justice. A loss is incurred, which the law directs shall be borne by certain persons in their several proportions; where a loss is to be repaired in damages, where else can they be recovered but in the courts of common law? and, wherever the law gives a right generally to demand payment of another, it raises an implied promise in that person to pay." And *Grose, J.*, said: "It is true, where there are many owners of

was thereby saved. The court held that these facts would have constituted a proper case for general average under the maritime law; but that the doctrine of general average is known only to the maritime law, and cannot be enforced in a court of common-law jurisdiction, and that the maritime law is not in force over lake navigation. This was in 1843; but in 1850 a case occurred in Illinois,¹ in which the court took jurisdiction, although it was a case

the cargo, there may be as many actions brought, but that arises from the necessity of the thing; and I should still say that they are all liable to answer for their respective proportions."

¹ *Gillett v. Ellis*, 11 Ill. 579. The only objection raised to the claim for contribution was that the goods were stowed on deck, and this objection was not sustained by the court. In a recent case, *Toledo F. & M. Ins. Co. v. Speares*, 16 Ind. 52, tried in 1861, the court also took jurisdiction, without question, of a case of general average. Here also the only question raised was in regard to the right to claim contribution for a deck load. In *Gazzam v. Cincinnati Ins. Co.*, 6 Ohio, 71, the action was upon a policy insuring \$6,000, agreed value, upon one half of a steamboat navigating the Ohio River. The boat, by distress of weather, ran on the rocks at the falls of the Ohio, necessitating a jettison, repairs, the hire of extra labor, and other expenses. Among the items of loss for which the jury found the insurers liable were one half of the boat's average for extra expense of labor in getting her off the rocks, one half of her average on jettison of the cargo, and one half her contribution for wages of the crew while on the rocks. The court held that the plaintiff was entitled to judgment for all these expenses, except that for the wages of the crew during the detention, which should be deducted, because where, in case of accident, the crew are

retained under their original engagement, their wages are not an extraordinary expense; and, as they are not employed in consequence of the accident, their wages and subsistence do not result from it, and therefore are not chargeable upon the insurer. The only objection raised to the claim for general average was founded upon a stipulation in the policy that the insurer should not be liable for any partial loss, nor for any general or particular average, unless the loss or average should amount to ten per cent on the value. On account of this agreement it was contended for the defendant, that the claims arising under the head of general average should be analyzed to ascertain if the damage from each amounted to ten per cent; and that inasmuch as neither one half of the average found for salvage, nor one half of that found for jettison, amounted to ten per cent, both of those items should be excluded. But the court decided that this could not be done, and that the insurers were liable if the *whole* average loss amounted to ten per cent on the value. Where goods are shipped on board a barge to a port on the Western waters, and the barge on the voyage is accidentally grounded and in danger of being lost by the perils of navigation, together with the goods on board, and it becomes necessary, for the purpose of saving the barge and lumber from destruction, to unload and reload the same, and the

of general average, and applied the law without any reserve or any intimation, either that the counsel raised, or that the court considered, any objection whatever to its jurisdiction.

It is true that, since the case in Michigan, admiralty jurisdiction has been extended, both by statute and adjudication.¹ But the court of Illinois was a common-law court, and the action was a common-law action. We have no doubt whatever that the law of general average would now be applied to all cases occurring on our Western waters, by the same jurisdictions and in the same way in which it is applied in the Atlantic States to cases occurring on the ocean. We have, indeed, one case in Massachusetts, in which the principles of general average *eo nomine* were applied to a case arising in the city of Boston under a fire policy.²

master does so load and reload, and take care of the barge and goods when so unloaded, it is a case for general average. *Dilworth v. McKelvy*, 30 Mo. 149. See also *Louisville Ins. Co. v. Bland*, 9 Dana, 143; and *Firemen's Ins. Co. v. Fitzhugh*, 4 B. Mon. 160; in both of which the courts took jurisdiction of questions of general average arising upon policies of insurance on property upon the Western waters.

The rule of one third new for old in the law of marine insurance is applicable to the insurance of steamboats on the Western waters. *Wallace v. Ohio Ins. Co.*, 4 Ohio, 234, 242.

¹ An act of Congress, approved Feb. 26, 1845, entitled "An act extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same," extended the maritime law of the United States over the lakes, with certain restrictions and limitations therein mentioned.

² *Welles v. Boston Ins. Co.*, 6 Pick. 182. In this case an insurance against fire was made on stock in trade contained in a store. A fire happening in the neighborhood, the insured, with the

consent of the insurer, procured blankets and spread them on the outside of the store, whereby the building and its contents were preserved, but the blankets were rendered worthless. The plaintiffs paid for them, and demanded from the defendants an entire indemnity. The defendants refused to pay the whole of the loss, on the ground that they were not included in the policy, but offered to contribute in proportion to the interest which the parties respectively had at risk. It was held that the loss was not covered by the policy, but that the insurer and insured should contribute to it in proportion to the amount which they respectively had at risk in the store and its contents. The court said: "The plaintiffs can claim then only on the ground of a sacrifice made by them for the preservation of the property endangered by the fire, and for a proportion of which sacrifice they are equitably, if not legally, entitled to recover. They contend, however, that this is not a case proper for contribution, it being customary on fire policies to pay the whole loss. We believe the practice to be as stated; but as the present claim is not

The eminent counsel asserting this principle rests it upon the analogy between the law of general average and that of contribution by co-sureties. And Chancellor Kent, speaking of adjustment of losses by fire, says: "So there may be a general average for a sacrifice made by the insured for the common good in a case of necessity. It is analogous to the law of contribution by co-securities,"¹ and he refers for his authority for this statement to the Massachusetts case above cited. We treat in this work only of marine general average; and while we admit that this is, strictly speaking, a part of the system of maritime law, we should also insist that maritime law, or the law merchant (a phrase sometimes used as synonymous with maritime law), is itself a part of the common law.²

within the contract, it certainly is reasonable that the plaintiffs should bear a proportion of the sacrifice made for the common benefit. This decision does not call in question the general principle, that a loss under a policy against fire is to be paid without contribution."

¹ 3 Kent's Com. 375.

² At an early period in the history of the common law, a question arose whether the "custom of merchants" was to be pleaded as a custom of certain places, or to be regarded as a part of the general law, of which the courts would of themselves take cognizance. In *Pierson v. Pountneys*, Yelverton, 135 (1609), the court say: "The judges ought to take notice of that which is used amongst merchants for the maintenance of traffic." And in *Vanheath v. Turner*, Winch's Rep. 24 (1622), Chief Justice *Hobart* declared that "the custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice." And Coke, 1 Inst. 182 a, says that "the *lex mercatoria* is part of the laws of this realm." In 1666, in *Woodward v. Rowe*, 2 Keble, 105, and afterwards,

page 132, it was distinctly held, that the custom of merchants was a part of the law of the land, that it attached to the contract, which was a bill of exchange, and that "the custom is good enough, generally, for any man without naming him merchant." In 1689, in *Carter v. Downish*, 1 Shower, 127, in which this question was precisely raised, it was held that "all this law of merchants is part of the law of the land, and the judges are obliged to take notice of it, as well as of any other law." In 1691, in *Mogadara v. Holt*, 1 Show. 317, and 12 Mod. 15, *Holt*, C. J., said: "The time is well enough by the law of merchants, and that is the same with our law." And *Eyres*, J., said: "The law of merchants is *jus gentium*, and we are to take notice of it." In *Edie v. The East India Co.*, 2 Burr. 1226 (1760), the court spoke in very positive language, as if they would prevent this question from ever being mooted again; *Foster*, J., saying: "The custom of merchants or law of merchants is the law of the kingdom, and is part of the common law. People do not sufficiently distinguish between customs of different sorts. The true distinction is between general

Insurers are bound by the policy to indemnify the insured against losses by the peril of the sea. If the insured loses nothing directly, but is compelled by the law of general average to compensate another shipper for property thrown over for the benefit of the insured, what the insured is thus obliged to pay is a loss by him, for which his insurers must indemnify him.¹ And as much the larger part of maritime property now goes to sea under insurance, the law of general average becomes an essential part of the law of insurance.

The rules of general average are founded alike upon justice and expediency; upon justice, because it is obvious that if A's property was saved, and B's property was sacrificed for the benefit of saving A's, A should indemnify B for his loss. But the reasons of the law derived from expediency are as certain and as obvious as those resting upon justice. If we suppose a vessel with her cargo to be owned by the same person, the rule of general average cannot apply to him. But let us suppose that the cargo is owned by many persons; an imminent peril threatens the whole with destruction; this peril may be averted by the sacrifice of a part of the property in peril; as, for example, by throwing over some of the goods, and so lightening the vessel and enabling her to get off from

customs, which are part of the common law, and local customs, which are not so. This custom of merchants is the general law of the kingdom, part of the common law, and therefore ought not to have been left to the jury after it has been already settled by judicial determinations." And Justice *Wilmot*, says: "The custom of merchants is part of the law of England; and courts of law must take notice of it as such." And finally, in *Pillans v. Van Mierop*, 3 Burr. 1669 (1765), Lord *Mansfield* said: "The law of merchants and the law of the land is the same. A witness cannot be admitted to prove the law of merchants. We must consider it as a point of law." See also *Williams v. Williams*, Carthew, 269; *Hodges v. Steward*, 12 Mod. 36; *Pinkney v. Hall*, 1 Lord Raymond, 175; *Bromwich v.*

Lloyd, 2 Lutwyche, 1585; *Hawkins v. Cardy*, 1 Ld. Raym. 360.

¹ Pothier, *Trait. d'Ass. n.* 52; *Roccus de Assec.* 62; *Park on Ins.* (8th ed.) 277; 1 Mag. 55; *Mumford v. Com. Ins. Co.*, 5 Johns. 267; *Strong v. F. Ins. Co.*, 11 Johns. 333; *Padelford v. Boardman*, 4 Mass. 550. We shall consider presently the case where a general-average loss is adjusted at the port of destination, conformably to the law and usage of such port, and the assured pays his contributory portion thereof, and the contributory interests have been estimated upon principles differing from those which prevail at the place where the policy was underwritten. On this point we refer now to *Loring v. Neptune Ins. Co.*, 20 Pick. 411; *Strong v. F. Ins. Co.*, 11 Johns. 323; *Depau v. Ocean Ins. Co.*, 5 Cow. 63.

a rock. Now, but for the law of general average, the owner of the goods thrown over loses them with no compensation from any party; and it is plain, therefore, that the different owners, if on board, would strive each to save his own; and in loading the cargo, each owner would naturally endeavor that his goods should be as far as possible out of reach in such an emergency. But it is often important that the goods should be laden in the order and the manner required by their nature, as the heaviest at the bottom, and the lighter above; for otherwise the ship will lose much of her stability; and when an emergency arises which calls imperatively for a jettison of a part of the property, it is of extreme importance that no time be lost. If the master, through a previous arrangement with some owner, or influenced by him or his representative on board, undertook to select one man's goods for jettison, and another man's for preservation, the safety of the ship and remaining cargo, to secure which is the only purpose and justification of the jettison, might be greatly endangered. All this is prevented by the rule which makes it entirely immaterial to each owner whether his goods go; for then the rest pay him whose property is sacrificed.

But the justice and reason of the rule show us that the owner of the goods lost is not to be repaid their full value, for then he would gain an advantage by having his goods and not those of another thrown over. He must be so far compensated that he should lose the same proportion of the value of his property which was sacrificed that he would have lost had the property sacrificed belonged to another owner.¹ In other words, each of the owners benefited must lose as much and save as much as the other owners do, without any reference to the question which owner it was who owned the property sacrificed.

This object is attained by the simple process of first adding together the values of all the property saved, together with the

¹ *Lee v. Grinnell*, 5 Duer, 431; Abbott on Shipping, 506. By the civil law, only the goods actually saved were to contribute. *Id tributum servatæ res debent*. Dig. lib. xiv. tit. 2, f. 2. But their rate of contribution may have been such as to leave on the party receiving contribution his share of the loss. By the Consolato del Mare it is expressly provided that the property lost be contributed in common with that saved. Consolato del Mare, cap. 51 of Pardessus, Lois Maritimes, vol. 2, pp. 101, 102.

value of the property lost, and then ascertaining the proportion which the value of what is lost bears to this whole value; and every owner must pay that same proportion of his property which was saved to the owner of the property sacrificed. The effect of this is that he is compensated for the property sacrificed excepting the same proportion or percentage which others lose, and this he also loses. Thus, if a ship be worth \$20,000, the freight, \$10,000, the cargo, \$70,000, of which A owns \$30,000, B \$20,000, and C \$20,000; there is a jettison of A's goods to the amount of \$10,000 which saved all the rest. To ascertain the amount due to him from the other parties, first, the whole property at risk is added together, and in the above case it amounts to \$100,000, of which ninety per cent is saved, and ten per cent is lost. Therefore everybody must lose ten per cent. The ship pays A \$2,000, the freight pays him \$1,000, B pays him \$2,000, C pays him \$2,000; and these payments amount to \$7,000, and he thus remains a loser of \$3,000, which is ten per cent of his property, or the same percentage which the others lose by their contributions to him.

This principle of indemnity, whereby the owner of the property sacrificed is left in no better position and in no worse position than the other owners, may seem to be a very simple one to those who have had much practice in the law of general average; but some obscurity in the apprehension of this principle not only causes some of the difficulties in its application in practice, but as we think some uncertainty in the adjudications on this subject.

SECTION II. — *There must be a Voluntary Sacrifice of Property for the Benefit of other Property.*¹

THE voluntariness of the loss is the very foundation, and the only foundation, of any claim for compensation. The owner

¹ It is often said, that, in order to make a case of general average, it is necessary, not only that the ship should be in distress, and the property endangered, and a part sacrificed in order to preserve the rest, but that it is necessary also that this sacrifice should be conducive to the saving of the rest, and that it should be voluntary. *Sims v. Gurney*, 4 Binn. 524. See also *Peters v. Warren Ins. Co.*, 1 Story C. C. 468; 3 Kent, Com. (5th ed.), 232; *Arnould on Ins.* 881; *Emerigon*, chap. xii., § 39, tom. 1, p. 588 (ed. 1827). We shall

of the property lost stands in precisely the same position as if he and the other owners stood on the deck of the imperilled vessel, and all saw that the common peril might be averted by the sacrifice of his property, and he consented to this sacrifice, which he might have refused; they, in consideration thereof, promising to compensate him therefor. It is plain, therefore, that if his own property, with no action of anybody, but by a mere peril of the sea, is lost, this loss gives him no claim whatever for compensation.¹

The most ancient, and once, if not now, the most usual form of this voluntary sacrifice, is a jettison of the cargo to lighten the ship. It would be the same thing if the cargo is jettisoned in any way to relieve the ship, as to get at a leak for the purpose of stopping it.² It must be not only voluntary, but intended as a means of saving the remaining property; and

hereafter consider in what sense this is true. To give a claim to contribution, there must be a voluntary sacrifice of property for the benefit of other property *embarked in a common adventure*; if A's vessel is about to come into collision with B's, which is at anchor, and B cuts his cable and thus avoids it, he has no claim for contribution against A for the loss of the cable and anchor. The John Perkins, U. S. C. C., Mass. 1857, 21 Law Rep. 87, 97. *Seem*, that where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average, whether the ship and cargo and freight belong to one only or to different adventurers, or whether they are partially interested. Oppenheim v. Fry, 3 B. & Smith, Q. B. 873, per Blackburn, J. That all losses which arise in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, see Birkley v. Presgrave, 1 East, 228; and that all casual and inevitable damage and loss, as distinguished from that which is purposely incurred, is a subject of par-

ticular, not general average, *Shiff. v. La. State Ins. Co.*, 6 Mart. La. 630. It is deemed essential, in every case of general average, that the mind and agency of man be employed in producing the sacrifice or delay, in contradistinction to such unavoidable detentions and losses as arise from accident beyond the control of the master. *Spafford v. Dodge*, 14 Mass. 74. General average can only arise where the sacrifice has been made for the common benefit, and has accomplished the object. *Williams v. Suffolk Ins. Co.*, 3 Sumn. 513.

¹ *Ross v. Ship Active*, 2 Wash. C. C. 241; *Lyon v. Alvord*, 18 Conn. 75.

² 1 Magens on Insurances, 160, Case IX. In a case here mentioned goods were taken out of a vessel which had sprung a leak at sea, and put on board other vessels, that the leak might be discovered and stopped. In consequence of this, she was enabled to prosecute and complete her voyage. The goods taken out were captured, and were contributed for in general average.

unless this were the purpose of the loss, it gives no claim to contribution.¹ It may be added, that it is unquestionably the

¹ That no loss or expense is considered and applied in general average, unless it was intended to save the remaining property, and unless it accomplished the object, see *Williams v. Suffolk Ins. Co.*, 3 Sumner, 510; *Scudder v. Bradford*, 14 Pick. 13; *Nickerson v. Tyson*, 8 Mass. 468. Thus jettison, which in its largest sense signifies any throwing overboard, in its ordinary mercantile sense means a throwing overboard for the preservation of the ship and cargo. *Butler v. Wildman*, 3 B. & Ald. 402. If, therefore, at the time of sacrificing the cargo, there was no possibility of saving it, there is no contribution. *Crockett v. Dodge*, 3 Fairf. 190. Where goods on the deck of a propeller were on fire, causing imminent peril to vessel and cargo, and certain to be themselves consumed, and were thrown overboard, and the vessel and remainder of the cargo saved thereby, it was held to give no claim to contribution, because the loss could not be attributed to the jettison, as the goods were already of no value by reason of the certainty of their destruction by fire, and because, for that reason, they could not be regarded as voluntarily sacrificed. *Slater v. Hayward R. Co.*, 26 Conn. 128. There must be an intent and an act prompted by and tending to a practicable, or at least a probable result, and not mere endurance or submission to uncontrollable necessity, in either case. *Daniels, J.*, in *Barnard v. Adams*, 10 How. 270. This principle was involved in a late case in New York, *Lee v. Grinnell*, 5 Duer, 400, in which the facts were the following: On the night of the 26th of December, 1853, the sails, masts, and

spars of the ship *The Great Republic*, then lying at a wharf in the port of New York, accidentally caught fire, and such was the progress of the flames that their destruction was certain. The masts, &c., were accordingly cut away, and one of the questions which came before the court was whether this cutting away of the masts was a voluntary sacrifice, creating a loss to be contributed for in general average. Upon this question, *Hoffman and Duer, JJ.*, differed, the former holding the affirmative and the latter the negative. *Duer, J.*, was of the opinion that the loss of the masts and spars that were cut away when they were actually on fire, and their destruction was certain, and their value wholly gone, and when it was only by cutting them away that the fire could be so reached as to afford a hope that it could be extinguished, and the act was therefore a positive duty, and not a deliberate sacrifice, was a loss, not to be made good by a contribution, but to be borne exclusively by the ship and her insurers; in other words, was a particular, and not a general average. But *Hoffman, J.*, said: "There is much authority to show that the demand for contribution is not limited to cases where the voluntary act both commences and completes the destruction of the subject for which it is claimed. It extends to cases where accidental peril has begun, and the voluntary act has consummated, that destruction. . . . I apprehend, then, that although a fortuitous cause has begun the work of destruction of part of a ship, if a voluntary act completes it, and that act averts or diminishes the damage to the cargo and rest of the ship, there is

duty of the master to enter in his log-book all the facts and circumstances of the jettison, with a sufficiently full detail of whatever constituted the necessity, as well as a distinct statement of the property jettisoned; although we do not suppose that a disregard by him of this duty would affect the rights or obligations of the parties interested.

It is not, however, necessary that the property should be intentionally destroyed.¹ It is enough that it is voluntarily exposed

ground for contribution; and that this rule is equally applicable, whether it is certain that the fortuitous cause would have destroyed that portion if left alone or not."

¹ An intention to consign the goods thrown overboard to inevitable destruction forms no part of the reason assigned by the Rhodian law for contribution. It is the motive for the act, in relation to the rest of the property, and not the intention of the jettison in relation to the fate of the thing sacrificed or exposed to danger, which gives rise to the law of contribution. *Caze v. Reilly*, 3 Wash. C. C. 303. This principle is directly involved in some cases of voluntary stranding. Thus in *Barnard v. Adams*, 10 How. 270, 304, the action was brought for contribution for the loss of a vessel belonging to the plaintiffs. It appeared that the vessel was in imminent danger of being driven on a rocky and dangerous part of the coast, where she would have been inevitably wrecked, with loss of ship, cargo, and crew, and this immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured. It was contended for the defendants, that as the stranding of the vessel was inevitable, and her master, in the ordinary exercise of his duty, directed her course to that part of the shore which

he supposed to be the safest for the vessel, this act did not render the stranding a voluntary sacrifice, or entitle the ship-owners to contribution from the owners of the cargo in general average; that as the ship did no more than pursue that course which, independently of the good or evil thence resulting to cargo, was most safe for herself, she could not be said to encounter a peril or incur a loss for the benefit of her cargo. But the court held that the right to contribution did not depend on any real or presumed intention to destroy the thing cast away, but on the fact that it has been selected to suffer the peril in place of the whole, that the remainder may be saved. In a subsequent case, that of *Sturges v. Cary*, 2 Curt. C. C. 59, the vessel of the plaintiffs being in imminent danger of destruction by the action of the wind and sea, the master, after consulting with his officers, for the safety of the ship and cargo and the lives of those on board, shipped the cables and run the vessel ashore on the beach. Great damage was done to the vessel, and heavy expenses were incurred in consequence in getting her off and repairing the damages. The ship-owners claimed of the owners of the cargo, by way of general average, their respective proportions of the damage, loss, and expenses so incurred, on the ground that these constituted a sacrifice incurred by the owners of the vessel for the common

to a peculiar and extraordinary risk, with the purpose of thereby promoting the safety of the ship or of other parts of the cargo. Thus, if a part of the cargo, instead of being thrown into the sea, is, for the purpose of relieving the ship, put into boats to be taken to the shore, and is lost on the way there, this would give a claim for contribution, although it was hoped that the goods would reach the shore safely.¹ So goods taken out of a ship and put upon the beach to lighten her when stranded, if damaged, furnish a claim for contribution.² But if in the common peril a part of the goods were put into the boats as the only way of saving them, and with no purpose of saving the rest of the property, and the boats were swamped, and the goods lost, there should now be, on the general principles of average, no claim for contribution, although the lightening of the vessel did in fact relieve her.³ In practice, however, it would generally

benefit of the vessel, cargo, and freight, and all interested therein. This claim the defendants resisted, on the ground that the damage, losses, and expenses were not incurred by any voluntary sacrifice of the vessel for the safety of the goods on board, but were occasioned remotely and immediately by the inevitable and irresistible force of the winds and waves. But this claim was allowed, the court saying: "It is quite true that the vessel, as well as the cargo, were in more danger of destruction while at some distance from the shore, and beating on the rocks, than by going on the beach; and that, in some sense, it cannot be said the vessel was sacrificed when she was relieved from the greater peril by being stranded. But in the sense in which this word is used in the law of general average, the stranding was a sacrifice. The fact that the peril impending over the ship and cargo would have destroyed both if not averted, so far from being inconsistent with a claim of this kind, is a necessary prerequisite to the voluntary act of the master; and what is denominated a

sacrifice means, *not that its subject is destroyed, or even subjected to a greater danger than it was already in, but that it is selected to suffer alone, and thus avert the common peril.*"

¹ *Lewis v. Williams*, 1 Hall, 437; *Stevens on Average*, p. 15. The subject of voluntary stranding will be considered more fully hereafter.

² *Hennen v. Monro*, 4 Mart. N. S. 449.

³ In *Whitteridge v. Norris*, 6 Mass. 125, the plaintiff shipped a keg of dollars on board a ship of which the defendant was master, to be carried to Calcutta. The ship, after her arrival in Bengal Bay, struck ground, and was thought to be in imminent danger of perishing. In this extremity the master and crew took to the boats and forsook the ship. They attempted to save some articles of the lading; and some kegs and bags of dollars, amongst which was the plaintiff's, were put on board the long-boat. The long-boat being found to be overladen, it became necessary for the preservation of the lives of the people on board to lighten it, and among the articles thrown overboard was the

be supposed that the goods were thus imperilled for the purpose of saving the property in the manner in which the loss of them did in fact relieve her, unless it was seen to be otherwise.

The word "jettison" is usually applied to the goods alone, but there may be a kind of jettison of parts of the ship. If the masts are cut away, or the sails and rigging cast off, or a cable cut and an anchor lost, or guns thrown over, or provisions, to save

plaintiff's keg of dollars. The boat, with the people on board and the remainder of the articles taken from the ship, reached the shore in safety. The ship, on the following day, was regained by the master and crew, and not having suffered any material damage, was taken, with the remainder of her cargo, to Calcutta. The plaintiff claimed a contribution for his loss in the jettison from the boat. The questions submitted to the court were, whether the ship and the residue of her lading which arrived at Calcutta, or that part of the lading which was saved immediately in the boat, were liable to a contribution for the benefit of the plaintiff. It was held that as the master and crew, in taking to the boats, acted with no intention or purpose directed to the common preservation of the ship and cargo, and although the ship and cargo left on board arrived in safety, as their preservation was not owing to the dereliction of the master and crew, or to the unsuccessful attempt to save the plaintiff's adventure in the long-boat, the case, on the whole, had no requisite or circumstance of a case of contribution and average, as it respected the ship and cargo. It was held further, as to the few articles of the cargo which were brought to the shore in the long-boat, that although they were preserved in some measure at the expense of the plaintiff, yet, as the goods saved in the boat and those jettisoned from it were exposed together, in consequence of a previous peril, and for the purpose of saving what could be saved, without any concert or mutual design of the parties interested; as the people in the boat were justified in lightening it in order to save their lives; as the goods thrown out, for every purpose of the inquiry, and as to the rights and duties of the particular owners or freighters, were in no other situation than that of the goods left in the ship, so that if the ship had perished the event would have been precisely the same; and as, if the goods lost in the jettison from the boat had been left in the ship, the danger from overloading the boat would not have been incurred, the eventual safety of the ship, and the loss of the plaintiff's dollars in attempting to save them without any regard to the safety of the ship, or of the other effects taken together into the boat, afforded no case of contribution or average. The court added, that "the requisites to a case of that nature are a contract, by which distinct properties of several persons become exposed to a common peril, and a relief from that peril at the expense of one or more of the concerned, who thereupon are entitled to a contribution from the rest; provided the benefit was intended as well as obtained for them, at the peculiar hazard, or by the destruction of the property lost." See also *Benecké & Stevens on Av.* (Phil. ed.) p. 65; *Molloy*, Book 2, ch. 6, § 12.

the ship and cargo from wreck, the loss must be averaged on the property saved.¹

¹ Walker v. U. S. Ins. Co., 11 S. & R. 61; Sims v. Gurney, 4 Binn. 513; Greely v. Tremont Ins. Co., 9 Cush. 415; Potter v. Providence Washington Ins. Co., 4 Mason, 298; Dig. 14, 2, 2, 1; Le Guidon, c. 5, a. 21; Laws of Oleron, a. 9; Cod. de Com. l. 2, t. 11, a. 211; Hennen v. Monroe, 16 Mart. La. 449; 3 Kent, Com. (5th. ed.), 238. If a master, compelled by necessity, cut his cable from the anchor, that with it he may fasten the ship to the pier, its value must be made good by contribution. Birkley v. Presgrave, 1 East, 220. A freighter of goods is not bound to contribute his proportion of the price which the new masts cost, but is only responsible for his proportion of the value the masts had at the time they were cut away. Teetzman v. Clamageran, 2 La. 195. It is simple particular average, if the mast is broken by the force of the wind, without the concurrence of man. But if, the wind having broken the mast, it is necessary to complete the fracture, and to cast the mast into the sea with sails and rigging, it is then a gross average, for the value of the mast and accessories in the state the whole was in when broken. Emerigon, tome 1, ch. 12, § 41, p. 622. When, by an ordinary peril of the sea, a mast is broken, a boat detached, or a leak disclosed, such accidents are matter of simple particular average, to be borne by the owner of the ship, and not subjects for contribution; but if, during a storm, or a combat, it is found necessary, for the purpose of relieving the ship, or facilitating a manœuvre, to cut away a mast, or make any other sacrifice, that must be considered as a case of common general

average. In combining these two rules, it results, that if a blast of wind had broken the mast, and then, for the safety of the ship, it was necessary to complete the fracture, and cast the mast, with sails and rigging, into the sea, that last measure would form a case for common contribution, and the amount would be determined according to the value of the mast and appendages, at the time of the breaking produced by the accident. Before the determination to make the sacrifice, it was but a case of simple average. 3 Pardessus, Droit. Commercial, Art. 737, 738. The imminence of the danger makes no difference; if a cable is voluntarily cut, and the vessel is afterwards saved, it is not less a general-average charge that there was reasonable or even strong ground to believe that, without such cutting, the cable would have soon parted. It was a voluntary act at the time it was done, and this gives it its character. Greely v. Tremont Ins. Co., 9 Cush. 419. Damage done to a vessel by cutting holes in the deck to pour down water to extinguish a fire is a proper item for contribution. Nelson v. Belmont, 5 Duer, 310. If the masts and rigging are carried overboard by the violence of the weather, but remain attached to the hull, and it becomes necessary for the preservation of the ship to cut them away, the damage caused by the act of so cutting them away is to be contributed for only to the extent of the value of the mast and rigging, when thus hanging by the side of the vessel. Nickerson v. Tyson, 8 Mass. 467; Teetzman v. Clamageran, 2 La. 197. The owners of the cargo are liable to contribution for ship's stores necessarily thrown over-

SECTION III. — *The Sacrifice must not be caused by the Fault of the Owner.*

THE sacrifice must be not only voluntary and intended, but in no degree the fault of the owner. A familiar illustration of this may be found in the law concerning goods carried on deck. It is a general and an ancient rule of the law of shipping, that goods shall not be carried on deck.¹ The reasons for this are obvious; not only is cargo there placed itself more liable to loss, because if waves swept the deck it would be washed over, but it would generally endanger both ship and cargo, as it puts the weight far from the keel, and, by raising the centre of gravity, makes the ship less stable. It encumbers the deck, which might be a matter

board after a vessel is captured, and while she is in the hands of an enemy. *Price v. Noble*, 4 Taunt. 123.

The fact that the ship-owner is insured does not affect his right to recover general average. *Ibid.*

If, with a view to the general safety of ship and cargo, it becomes necessary to damage and destroy another ship, as, for instance, if a number of ships are lashed together, and one takes fire, and the crews of the others unite in scuttling the burning ship for the safety of the rest, the loss of the ship so destroyed is said by Mr. Arnould, citing, in support of his opinion, foreign authorities, to be a general-average loss to which all those saved thereby must contribute. 2 Arnould on Ins. 895. We should have some doubt of this. A ship on fire should not, generally, at least, be scuttled, if the fire could be extinguished; and if she was scuttled, when she could not be saved, we should not call this a general-average loss.

¹ Ord. Louis XIV., tit. Jet. a. 13; Cod. de Cour, a. 232; Emerigon, ch. 12, § 42, vol. 1, p. 623 (ed. 1827); *Consolato del Mare*, par Pardessus, c. 186; *Johnston v. Crane*, 1 Kerr, N. B.,

356; *Lenox v. United Ins. Co.*, 3 Johns. Ca. 178; *Walcott v. E. Ins. Co.*, 4 Pick. 429; *Bell's Commentaries on Laws of Scotland*, vol. 1, p. 586; *Dodge v. Bartol*, 5 Greenl. 286; *Cram v. Aiken*, 13 Me. 229; *Taunton Copper Co. v. Mer. Ins. Co.*, 22 Pick. 108; *Smith v. Wright*, 1 Caines, 43; *Hampton v. Brig Thaddeus*, 4 Mart. La. 582; *Doane v. Keating*, 12 Leigh, 391.

In England, by the Customs Consolidation Act, 1853, 16 and 17 Vict. c. 107, §§ 170, 171, and 172, it is enacted, that before any clearing officer permits a ship wholly or partly laden with timber to clear from any British port in North America or Honduras for any port in the United Kingdom, after September 1st or before May 1st in any year, he shall ascertain that the whole cargo is below deck, and give the master a certificate to that effect; and the master shall not sail without such certificate, and shall not allow any part of the cargo to be upon deck (except in specified cases of necessity); and if the master sail without the certificate, or load in the mode forbidden, he shall forfeit £100.

of grave importance in a storm.¹ Goods therefore ought not to be carried on deck; if then, being carried there, they are jettisoned to save the ship and cargo from impending peril, this loss gives no claim for contribution.²

The rule, that the jettison of goods carried on deck gives no

¹ This must be at least generally true; but in *Lapham v. Atlas Ins. Co.*, 24 Pick. 1, it was held that the circumstance of carrying goods on deck, if it did not increase the risk, would not of itself avoid the policy, and that a general usage for the same species of vessels to carry deck loads was competent evidence, in connection with the opinions of nautical witnesses, to show that, in fact, the risk was not increased by carrying the goods on deck.

² The master of a ship, who has signed the usual bill of lading, is not liable for a loss by the jettison of goods which have been laden on deck with the knowledge and consent of the shipper and consignee. *Johnston v. Crane*, 1 Kerr N. B., 356. An insurance does not reach goods on deck, unless expressly mentioned. They are not considered as part of the cargo, in which the other shippers are interested. The owners of the cargo *under cover* ought not, therefore, to contribute to the jettison of the goods on deck. *Lenox v. United Ins. Co.*, 3 Johns. Ca. 178. For goods shipped on deck and ejected there is no contribution. *Smith v. Wright*, 1 Caines, 43. The reason why, for goods laden on deck, neither contribution nor general average, in case of ejection, can be claimed, is, that they themselves increase the danger of the navigation, and are taken on board under an implied agreement that they shall be sacrificed, if it be necessary to eject. Same case, in note, where goods are transported by water from place to place, a usage at such places to carry a

certain description of goods on deck, after the hold is full, does not render the owner of a vessel liable to contribution for the jettison of such goods, when laden on deck. And where, by the usage of the place, such goods pay the same freight when carried on deck as if carried in the hold, they are not entitled to the benefit of general average, when paying full freight, if they are laden on deck and lost by jettison. *Cram v. Aiken*, 13 Maine, 229. If it becomes necessary, from stress of weather or the dangers of the seas, to sacrifice the deck load for the common safety, this does not present a case for contribution or general average, but it is the particular loss of the master, when the goods were placed upon deck without the consent of the shipper. *The Paragon*, Ware, 335.

In *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, the underwriter was held not to be liable for a hawser lost overboard which was stowed in the boat on deck when it should have been in the hold. Where the policy effects insurance generally, and no mention is made of any part of the cargo being on deck, either in the application for insurance or in the policy, the insurers will not be liable for the loss of the deck load; nor are they liable for neglect to specify the cargo on deck in the policy, when no mention is made of it in the application, or by the party applying, although a bill of lading mentioning it was handed to the secretary before issuing the policy, but which he never read or opened. *Smith v. Miss. M. & F. Ins. Co.*, 11 La. 142.

claim for contribution, is founded upon the reason that they ought not to be there; and wherever it is proper to carry the goods on deck, it might seem to be proper that the voluntary sacrifice of them should be contributed for. The propriety of so carrying them should be determined in any case, we think, and certainly so far as the law of insurance is concerned, by the custom.¹ The

¹ That the proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the ship-owner for a loss by jettison, see *Gould v. Olive*, 4 Bing. N. C. 134. In the above case *Tindal*, C. J. says: "As to the authorities in the English courts, there is no one which states directly that goods laden on deck shall in no case be entitled to contribution. The question, whenever it has arisen in our courts, has been between the owner of the goods thrown overboard and the underwriter. And the rule generally established seems to have been, that, for goods so laden, the underwriters are not responsible." In a later case, before the Court of Queen's Bench, the owner of pigs carried on deck on a passage from Waterford to London, and jettisoned, recovered against the owners of the vessel for a contribution in general average. Thereupon the owners of the vessel claimed reimbursement against the underwriters in a time policy. It was held, that, if the usage justified the carrying of the pigs on deck, the underwriters were liable. *Milward v. Hibbert*, 2 Gale & Dav. 142.

In the case of *Da Costa v. Edmonds*, 4 Campb. 142, there was a policy of insurance upon forty carboys of vitriol. These carboys were placed on the deck and lashed to the ship's side. They were broken in a storm; the vitriol took fire, and the whole was necessarily thrown overboard. Lord *Ellenborough* left it to the jury to say whether it was usual to carry vitriol on the deck, and

whether these carboys were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it *without any communication*, and all they could require was, that these carboys should be properly stowed.

A policy of insurance upon "catchings," in a whaling voyage, protects the "blubber," cut from the whale and on deck, it being proved that this was the place where it was usually carried. *Rogers v. Mechanics' Ins. Co.*, 1 Story, 603. In this case, *Story, J.*, in speaking of the effect of usage upon the language of contracts, says: "It must be some known general usage or custom in the trade, applicable and applied to all the ports of the State where it exists; and, from its character and extent, so notorious, that all such contracts of insurance in that trade must be presumed to be entered into by the parties, with reference to it as a part of the policy."

In *Browne v. Cornwell*, 1 Root, 60, an action was brought for the average loss of five horses thrown overboard in a storm to save the vessel and cargo. The question before the court was whether stock shipped upon deck, in case it was thrown overboard to save the vessel and the rest of the cargo, would entitle the owners to an average upon the goods, &c., shipped in the hold of the vessel, that were saved. The court determined that it would; that although stock upon deck is more exposed to danger, and in a storm exposes the vessel to greater risk, than goods in the hold, yet, as it

application of steam to the uses of navigation has given rise to some exceptions to the general rule excluding deck loads from the benefits of general average. From the peculiar construction of steamships, one of the reasons of the rule, namely, that carrying goods upon deck increases the difficulty of navigating the ship, does not apply, or at least not with equal force; and, *cessante causa, cessat et ipsa lex*.¹

was the universal custom to ship goods in the hold with stock upon deck, when stock upon deck is thrown overboard for the express purpose of saving from destruction the cargo in the hold, it is but reasonable that the cargo saved should bear a proportion of the loss which was the price of its ransom.

¹ The first case in which this distinction was made was that of *Hurley v. Milward*, 1 Jones & Carey, 224, in the Court of Exchequer for Ireland, at Easter term, 1839. This was an action for general average, against the owner of a steam vessel, by the owner of certain pigs which had been stowed upon deck and thrown overboard in a storm. In answer to an assertion of the defendant's counsel, that, according to every maritime code in Europe, property stowed upon deck is not the subject of general average, *Pennefather, B.*, said: "That is a proposition laid down with respect to sailing vessels. The reason of it is, that goods stowed on deck obstruct the mariners in the navigation of the vessel. In a steam vessel plying from port to port, that reason does not apply. This case was followed in the United States, in 1850, by that of *Gillett v. Ellis*, 11 Ill. 579. In this, after speaking of the general rule, the court say: "Propellers are a class of vessels but recently introduced in the navigation of the lakes, to which, from the peculiarity of their construction, and the general usage respecting them, this general rule is not applica-

ble. They are double-deckers, with two holds. By the general custom prevailing in reference to them, goods stowed on the main deck, or upper hold, are regarded as under hatches, and as safe as those stowed in the lower hold, or where cargo in ordinary vessels is only considered as under cover. This individual usage, resulting from the character of the vessel, must govern the rights and liabilities of the owners of the vessel and cargo. The owner of goods, which are stowed on the main deck of a propeller, and necessarily cast overboard by the direction of the master to preserve the vessel and crew, is, therefore, entitled to the benefit of a general average, as much as the owner of goods that are stowed in the hold would be, under like circumstances." In the case of *Harris v. Moody*, 4 Bosw. 210, Judge *Pierrepoint* says: "The old rule was established when all vessels were propelled by sails, and when there was no machinery in the hold of the ship; but the introduction of steam into marine service has wrought great changes in the situation of the motive-power, and has rendered the steamboat deck the fitter place for the stowage of cargo. The reason of the rule has ceased, and the rule should perish with the reason." This decision, given in the Superior Court of the city of New York, upon appeal, was confirmed. The trial before the Court of Appeals is reported in 30 N. Y. 266. See also *Mer. & Man. Ins. Co. v. Shillito*, 15 Ohio

It is a well-known custom for coasting vessels which make short trips along the shore to carry goods on deck. The vessels that bring lumber or hay from the Eastward to Boston and other ports have a custom of first filling the hold, and then building up the lumber or the bales of hay over nearly the whole deck and many feet high; and provision is made for raising the booms high enough upon the masts to swing clear of this deck load.

We apprehend the rule should be, that wherever from the peculiar nature of the goods or of the voyage, or in fact for any reason, a custom exists to carry goods on deck, and this custom is so well established and known that the insurers of the goods must be presumed to have known it, they should not only pay for them if lost, but should pay the owners of other goods for their contribution for these goods if they were jettisoned to save the ship and cargo.¹

Nor can we think that, to hold the insurers, it would be necessary to prove the custom of the insurers to pay for such losses, although this has been intimated.²

It is of course certain that the insurers may agree to insure goods carried on deck, and would be held to agree to this, if specific notice were given to them, when insurance was applied for, that the goods were so carried. But we suppose that, where such a custom of so carrying them exists, the insurers must be presumed to have known it when they made the policy. Articles carried on deck in conformity to the custom are insured

State, 559, to the same effect, and also Toledo Co. v. Speares, 16 Ind. 52, to the effect that goods upon the decks of sailing vessels are contributed for when jettisoned, provided there is a usage for their being so carried.

¹ The doctrine excluding goods carried on deck and jettisoned from the benefits of general average ought to be controlled by the usage of the trade, and accordingly contribution may be claimed for goods thrown overboard from the deck of small coasting vessels, or river craft, which usually carry a part of their cargoes on deck. Valin, Ord. de la Marine, art. 13.

² In Taunton Copper Co. v. Merchants' Ins. Co., 22 Pick. 108, it was held that the insurers were not liable for the loss of a quantity of copper in pigs, laden upon deck, notwithstanding the existence of a usage to carry on deck, without notice to the shipper and at the same rate of freight as if under deck, such goods as were not liable to be injured by dampness, it not being proved that insurers had ever paid for losses upon goods so laden, unless under a special contract, or unless, from the nature of the property, they were presumed to have assumed the particular risk.

under the general description of goods or merchandise, and with the usual effects as to the law of the case.¹

¹ That a commercial usage, having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it, is evidence of the intention of the parties, and illustrative of their agreement, see *Barber v. Bruce*, 3 Conn. 9. In *Noble v. Kennoway*, Lord Mansfield says: "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has only been for a year." *Noble v. Kennoway*, Douglas, 510. If a usage be general though not uniform, the underwriters are bound to take notice of it. *Vallance v. Dewar*, 1 Campb. 503. Lord *Eldon*, in *Anderson v. Pitcher*, 2 Bos. & Pull. 164, although regretting the rule, admitted that it was too late to question its force, and that policies of insurance must be expounded with due regard to the usage of trade. See further, as to the effect of custom, *Pickering v. Barkley*, 2 Roll. Abr. 248, pl. 10; *Lethulier's case*, 2 Salk. 443; *Parr v. Anderson*, 6 East, 202; *Halsey v. Brown*, 3 Day, 346; *Coit v. Com. Ins. Co.*, 7 Johns. 385. In *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108, cited in the previous note, *Putnam, J.*, also says: "The general rule unquestionably is, that a policy on goods or merchandise or property, in general terms, on board a ship, does not extend to goods, property, or merchandise laden on deck. But it is competent for insurers to take the risk of goods on deck, if the fact be expressly disclosed to them by the assured, or if the property or goods are named and they are such as are usually carried on deck,

and not under deck. . . . We agree to the position which is stated for the plaintiffs, a settled usage of trade to which the policy relates, not contrary to any principle of law, and not inconsistent with the object and terms of the policy, will be presumed to have been known by the underwriters, and taken into consideration when the contract was made, and will have the same effect as if such usage were inserted in the policy." See also *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 37. No notice to the underwriters of the existence of a custom to carry deck loads is necessary, in order to make them liable, they being bound to know the usage of the particular trade. *Toledo Co. v. Speares*, 16 Ind. 52. No notice to the underwriters of the existence of a custom of carrying goods on deck is necessary in order to make them liable, they being bound to know the usage of the particular trade. 2 *Arnould on Ins.* 888. *Valin*, Comment. on Ord. tit. du Jet. art. 13, vol. 2, p. 532 (ed. 1829). In cases of mercantile engagements, or in the construction of mercantile contracts, a general, practical construction which opposes no principle of law, but is agreeable to equity and fair dealing, has the force of law, the parties to such contracts always acting in reference to well-established and general usage. *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 8. A reference to usage is fairly implied in contracts of a commercial nature, and is to be presumed, indeed, in the construction of contracts generally, when the conclusion is not avoided by special circumstances or stipulations." *Sewall, J.*, in *Clark v. United F. & M. Ins. Co.*, 7 Mass. 369. See ante, Vol. 1, pp. 82-106, on Usage.

We have said that insurers should in such case pay not only the owners for their loss, but that insurers of others should pay what they are obliged to contribute for such loss; but it is a somewhat difficult question, and has been much discussed, whether the owners of other parts of the cargo should be held to contribute for the jettison of goods carried on deck. Our notes will show that the weight of American authority appears to be against such a claim for contribution, while the weight of English authority is in favor of that claim.¹

We cannot but think that the plain principle to which we have already adverted would suffice to determine all such questions. The ship-owner has no right to carry goods on deck, and the owner of the goods has no right to have them placed on deck. This is the general rule; and if one owner has his goods on deck, and they are jettisoned, and he claims contribution of the other owners of goods, they may well say to him, "You have, in the first place violated the law of shipping, and have imperilled our goods by so doing, and we shall not make you any compensation for the loss of your goods."² But on the other hand, while the general rule certainly is that the owner should not have his goods on deck, a custom may have given him a right to have them there. If the other owners of goods did not know, and had no reason to know, this custom, they would not be affected by it; but if the custom was so well established and so well known, that the owners of the other goods must be presumed to have known it, they have no longer a right to deny the claimant's right to place his goods there. We think the English cases apply to and illustrate this principle.

Then we should say that, although the custom was sufficient to justify the owner of the goods in having them on deck, and was brought home to the other owners so as to give him a claim on them for contribution, it must still be brought home to the knowl-

¹ See preceding note; and as against the liability of insurer, *Lenox v. United Ins. Co.*, 3 Johns. Ca. 178; *Walcott v. E. Ins. Co.*, 4 Pick. 429; *Dodge v. Bartol*, 5 Greenl. 286; *Cram v. Aiken*, 13 Me. 229; *Doane v. Keating*, 12 Leigh, 391; *Smith v. Wright*, 1 Caines, 43; *Hampton v. Brig Thad-*

deus, 4 Mart. La. 582; *Taunton Copper Co. v. Mer. Ins. Co.*, 22 Pick. 108. And in favor of their liability, *Da Costa v. Edmands*, 4 Campb. 142; *Gould v. Oliver*, 4 Bing. N. C. 135; *Milward v. Hibbert*, 3 Q. B. 120; *Browne v. Cornwell*, 1 Root, 60.

² *Lawrence v. Minturn*, 17 How. 114.

edge of the insurers to make them liable for what is thus paid by contribution.¹

The owner of the ship of course knew that the goods were carried on deck, for we should say, on this point, that the knowledge of his master was his knowledge;² and if it was not right to carry them there, the ship was as much in fault as the shipper, and we know not why the ship should not contribute for their loss, if saved by their jettison. But again we say, that insurers of the ship should not be held to pay for this loss by contribution in the absence of express bargain, unless the carrying of those goods on deck was justified by a custom which was brought home to the knowledge of the insurers.

If a deck load be thus jettisoned, and it was placed on the deck against the knowledge and consent of the shipper, the ship should pay him, not by way of contribution, but for the wrong-doing of the ship;³ and there is no reason whatever why the insurers of

¹ On an insurance upon goods, the underwriter is entitled, in general, to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods, not in a more dangerous part; or, if they be goods which ought not to be placed in the ordinary stowage, but in a more perilous situation, he ought to be apprised, either of the nature of the goods, or of the part of the ship in which they are to be put. *Blackett v. Royal Exch. Ass. Co.*, 2 Crompt. & J. 250.

² *The Paragon*, Ware, 335; *The Rebecca*, Ware, 194.

³ That if the master carries goods on deck, without the consent of the shipper, he is personally responsible, and through him the ship, for any loss or damage the goods may sustain from being thus exposed; and if it becomes necessary, from stress of weather or the dangers of the seas, to sacrifice the deck load for the common safety, this does not present a case for contribution or general average, but it is the particular loss of the master, it having been occasioned

by his own fault, see *The Paragon*, Ware, 335. The case of *The Waldo*, Davis, 161, was an action *in rem*, brought against the ship for the loss of a quantity of potatoes which were carried upon deck without the consent of the shipper, and perished from the exposure there received. The court say: "They were undoubtedly lost by sea damage, and, although the damages of the seas are excepted by the bill of lading, the master, by carrying the goods on deck, waives the exemption in his favor, and takes the responsibilities of sea damage upon himself, at least of any damage that would not have happened to them if they had been secured under deck." Where nothing is said in the bill of lading as to the manner of stowing the goods, whether on or under the deck, the legal import of the contract, as well as the usage and understanding of merchants, imposes upon the master the duty of putting them under deck, unless otherwise stipulated. *Creery v. Holly*, 14 Wend. 26. See also *The Rebecca*, Ware, 188; *Stinson v. Wyman*, Da-

the ship should be liable for this loss any more than for money paid to a shipper for injury to his goods from bad stowage, or from any other breach of the ship's duty. In one English case a peculiar and local custom seems to have determined the decision.¹

The rule that, where the loss is occasioned by the fault of the owner, there is no claim for contribution, has been applied to the case of a boat being cut away. There have been quite a number of cases on this subject. If a boat hangs at the stern or at the quarters of a vessel from the davits, it is easy for a sea which comes aft to fill the boat, and her weight may break her fastenings or the davits, and then the boat is lost. Whether the insurers are liable for this loss has been made a question, which may be

veis, 172; *The Schooner Reeside*, 2 Sumner, 567; *Waring v. Morse*, 7 Ala. 343; *Dorsey v. Smith*, 4 La. 211; *Sayward v. Stevens*, 3 Gray, 97; *Gardner v. Smallwood*, 2 Hayw. N. C. 349. If the stowage upon deck did not occasion the loss, the owner of the ship will be no more liable for damage to that part of the cargo than to the rest. *Gardner v. Smallwood*, 2 Hayw. N. C. 349.

¹ *Milward v. Hibbert*, 2 Gale & D. 142; S. C., 3 Ad. & El., N. S. 120; S. C., 43 Eng. Com. L. 659. This was an action by the owner of a steam vessel against the underwriter upon a time policy. The declaration alleged that certain pigs were shipped on board the vessel, and that, from stress of weather, it became necessary, for the preservation of the vessel and her cargo, to throw the pigs overboard, by reason whereof the plaintiffs, in respect of their interest in the hull, had to pay a proportionable part of the value of the pigs, and sustained a general-average loss. To this it was pleaded that the pigs so thrown overboard had been stowed on the deck, by reason whereof the defendant was not liable to contribute any average loss sustained by their jettison. The replication was that, at the time of

the jettison, the vessel was on a voyage between Waterford and London, and that the pigs were stowed on deck, according to the usage of the shipping trade between Waterford and London. On special demurrer to the replication, on the ground that it did not allege that the defendant had notice of the custom, it was held that the plea itself was bad, as the mere fact of stowing the pigs on deck was no answer to the action. Lord Denman, C. J., said that "the law of England has stopped very short of the doctrine that no owner of goods stowed on deck shall, under any circumstances, be allowed to recover contribution on general average. The question between the merchant and the ship-owner may be different from that between either of them and the underwriters, because the former may agree to stow the goods in such a manner that the latter will not be at all responsible for their loss. But it seems to the court, for the reasons assigned, that the mere fact of stowing them on deck will not relieve the underwriters from responsibility, inasmuch as they may be placed there according to the usage of the trade, and so as not to impede the navigation, or in any way increase the risk."

more properly considered when we come to inquire into the meaning of the perils of the sea. But neither the fastenings nor the davits may give way, and then the boat, being full of water, presses down the stern. This may be an added peril which it may be necessary to remove at once, and for this purpose the fastenings are cut and the boat is lost. Then the questions arise, Is this a voluntary sacrifice calling for contribution? and are the insurers of the cargo liable for this contribution?¹ We think that these questions must be determined by the further one, Was the boat properly in that place or exposed to that peril?² And again, this question must be determined by the custom. There is no such rule here as in respect to the deck load. It seems to be to a great extent left to the discretion of the master. Some insurers refuse to pay for the loss of a boat thus placed, believing it an unsafe practice, and being disposed to induce more caution. Others pay for it; for, while the boat is certainly safer on deck, it can hardly be said that this degree of caution is positively and peremptorily required of the master. There are certainly vessels, as whaling ships for example, which always do and perhaps must carry boats on the stern or elsewhere outside the vessel. Men-of-war, perhaps, always do, and very large merchant ships which require many boats usually carry some of them so. It is said by Emerigon that, in the commerce of the Mediterranean, boats so carried and lost were paid for, because if they were so carried it was easier for the crew to escape if the vessel were seized by corsairs.³ And it may obviously be convenient to carry a boat where it may readily be dropped into the water to save life or property. From considerations of this kind, perhaps, the Supreme Court of

¹ The ship's boat, being a necessary part of the ship's furniture, and being cut away for the general benefit, is properly brought into general average. *Lenox v. United Ins. Co.*, 3 Johns. Ca. 178. In an action on a policy of insurance in the usual form, on ship, boat, &c., evidence of usage that the underwriters never pay for the loss of boats on the outside the ship, slung upon the quarter, is inadmissible. *Blackett v. Royal Ex. Ass. Co.*, 2 C. & J. 244.

² When boats are obliged to be cut

away from the ring bolts to which they are fastened upon deck, and thrown overboard, it cannot be doubted that their value is to be allowed for in general average. But if, by negligence, they were left outside the vessel, or hung to the davits over the ship's stern, the room appropriated for them on deck being filled with goods, it is proper that no compensation should take place. *Benecké on Ins.* 187.

³ 1 Emerigon, ch. 12, sect. 41.

Massachusetts decided that, where underwriters refused to pay for a boat so lost, the burden of proof was on them to show that she was improperly carried in that way.¹

SECTION IV. — *The Loss must not be caused by a Mere Peril of the Sea.*

THAT the loss must be voluntary to found a claim for contribution is certain, and we have seen that a voluntary exposure to peril which might have been avoided, if by this peril the thing so exposed is lost, creates a claim for contribution. But it is sometimes very difficult to determine whether such an exposure was one of the common risks of navigation, or a voluntary sacrifice. For example, a vessel is in danger of a wreck upon a lee shore, or a capture by an enemy. She hoists all sails and takes the risk of their loss to avoid the greater peril; the sails and spars are blown away, but not until she has gained such a distance as to enable her to escape; are the sails and spars thus lost to be contributed for?² Authorities of great weight say they are, and this is perhaps the general rule on the Continent of Europe.³ But it is a little difficult to bring the case within the principles of general average. The sails and spars are provided for this very purpose,

¹ The ship's boat is included in the policy upon the ship, tackle, apparel, or other words equivalent, and the insurers are *prima facie* liable for its loss. If the boat is improperly carried, or slung at the stern davits, the underwriters are not to be charged with the loss of it; but the burden is upon them to show a good reason why they should not pay for the loss or damage of anything which is *prima facie* included and covered by the policy. *Hall v. Ocean Ins. Co.*, 21 Pick. 472.

² The damage occasioned to the ship and tackle by standing out to sea with a press of sail in tempestuous weather, the press of sail being necessary in order to avoid an impending peril of being driven on shore and stranded, is not the subject of general average. *Power v. Whitmore*, 4 M. & S. 141. All ordinary

losses and damage sustained by the ship, happening immediately from the storm or perils of the sea, must be borne by the ship-owners. But all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably as general average. *Birkley v. Presgrave*, 1 East, 220. See also *Covington v. Roberts*, 2 Bos. & Pull. N. R. 378; 2 Phil. on Ins. 80, 82; *Benecké on Ins.* 187; 1 Mag. 345, case 27; *Shiff v. La. State Ins. Co.*, 6 Mart., N. S. 629.

³ Valin, Ord. de la Mar. tit. du Jet. art. 1, p. 189; Boulay-Paty, Com. de Droit, Com. Mar. tit. 12, § 2, p. 446; Prussian Ord. § 1824; Emerigon, ch. 12, § 41, p. 622.

and should be adequate to this necessity. If they are weak from age or original imperfection, this is the fault or misfortune of the ship. It is, however, always possible that sails, spars, and cordage may be entirely sea-worthy, and yet there may be occasions for exposing them to a pressure far beyond what they are calculated to sustain; and if they are lost, and the ship and cargo saved thereby, it may well be asked, why should not the cargo contribute? In practice, this is one of the many cases in which insurers, in part from the comparatively small value of the articles lost, and in part perhaps from a willingness to encourage all possible efforts to escape from loss, usually acquiesce in demands of this kind without a strict inquiry into the grounds for defence.¹

As another instance of a voluntary sacrifice, goods being a part of the cargo are sometimes given to pirates or captors by way of ransom, and to obtain liberation of the ship and the residue of the cargo. They are as much sacrificed for the general safety as though they were jettisoned.² But if they are forcibly taken by

¹ In *Taylor v. Curtis*, *infra*, p. 239, n. 1, *Gibbs*, C. J., remarked at the trial *nisi prius*, 4 Campb. 337, that "the practice of underwriters sometimes to contribute to a loss such as this cannot weigh much, as it may be accounted for from the honor and liberality of those who contribute, and from the sense they must feel of their own interest. If there is no reward allowed for a gallant resistance, such resistances will not be made, and the whole value of the property must be paid, instead of a gratuity for saving it."

² Where a ship, hired and loaded by a neutral, was captured on suspicion of carrying enemies' property, and libelled as a prize, and a compromise was effected by the hirers giving the captors a bill of exchange, indorsed by the master of the vessel, it was held that the ship-owners were liable to the hirer, on payment of the bill, as for an average on the vessel and cargo at the time and place of incurring the expense. *Doug-*

las v. Moody, 9 Mass. 548. Where the supercargo of a ship, captured and libelled as prize, made a reasonable compromise with the captors, giving up a part of the property and retaining the remainder, it was held that the underwriters on the cargo were bound by such compromise. *Welles v. Gray*, 10 Mass. 42. Whatever a master may have agreed to pay for the ransom of his ship and cargo to any privateer or pirate, when taken, constitutes a general or gross average. 1 Mag. on Ins. 64. Where the master made a compromise with the captors, abandoning the ship and cargo to them, and being paid one fourth of their value, it was held to be binding upon the insurers, the court affirming that there was no ground for a distinction between a composition by which the subject, or a portion of it, should be specifically restored, and an equivalent given for the subject itself. *Clarkson v. Phoenix Ins. Co.*, 9 Johns. 1.

Ransom to a public enemy is pro-

the captors, the entire absence of voluntariness prevents any claim prohibited in England by statute. 22 Geo. 3, c. 35; 35 Geo. 3, c. 66, s. 37-39; 43 Geo. 3, c. 72, s. 16, 17; 45 Geo. 3 c. 72, s. 16. In speaking of these statutes, Mr. Phillips, in his work on Insurance, vol. 2, § 1336, remarks, that compositions with public enemies have been considered illegal, though not prohibited by specific laws. But no citations are made in support of the statement, and the weight of authority would seem to be against it. Chitty, in his Law of Nations, p. 90, says, that when a belligerent had possessed himself of property belonging to his enemy, it was formerly the custom, among almost all nations, to redeem it from his hands by ransom, but that the custom is now but little known to the commercial law of England; and he gives as the reason of the change the statutes of 22, 43, and 45 Geo. 3, thus implying that, apart from the statutory prohibitions, the custom is legal. Alzuni speaks of ransom between belligerents as undoubtedly lawful, and says: "A question here arises, whether a person is bound to keep a promise made to a pirate, who has released him for a pecuniary sacrifice, and consequently whether he is obliged to pay a bill of exchange given to the captor. All writers on public law hold the affirmative. Every engagement entered into with an enemy is a lawful obligation that ought to be faithfully observed. A bill of exchange, for the price stipulated for the ransom, is as binding on the drawer as any other commercial contract." Alzuni's Maritime Law of Europe, p. 314.

Mr. J. Story, in *Maisonnaire v. Keating*, 2 Gallis, 337, says that the right to take a ransom is not founded in a vested title in the captors to the captured property, but that it exists from the mo-

ment of capture; that the ransom is a relinquishment of all the interest and benefit which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal; and that in this respect there seems to be no legal difference between the case of the ransom of the property of an enemy and of a neutral; that the law of war prohibits all commercial intercourse, and suspends all existing contracts between enemies, and that the case of ransoms is almost the only exception which has been admitted to the general rule.

Sir William Scott, in the case of *The Hoop*, 1 Rob. Adm. 201, in stating the general rule of British maritime jurisprudence, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted, remarks that "even in the case of ransoms which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom."

The opinion that compositions are illegal, even when not prohibited by specific laws, may have arisen from the fact of their abolition by positive enactment in a number of maritime powers. In France, by an arret of the 11th October, 1780, ransoms were confined to certain cases, and finally, by the ordinance of August 30, 1782, were entirely prohibited. The placards of the States-General of the United Provinces of June 2, 1689, January 12, 1690, and June 28, 1692, the ordinance of Russia of 1787, article 27, and the ordinance of Spain of 1779, article 44, allow priva-

for contribution.¹ So if money or goods are jettisoned to prevent the enemy from obtaining them; here the sacrifice is voluntary, teers to accept of ransoms when they have already three prizes in possession, and prohibit them in every other case.

Under the statute of 45 Geo. 3, it has been held that if a master ransoms his ship and brings her home, the owner may take her from him without repaying what he expended, nor would the owner be obliged to repay money which was borrowed for this purpose. *Parsons v. Scott*, 2 Taunt. 363. Where the plaintiff and defendant, being taken prisoners, jointly solicited and obtained the liberation of themselves and the ransom of the defendant's ship, contrary to 45 Geo. 3, c. 72, to effect which the plaintiff lent money to the defendant, who afterwards gave him a bill for the amount, it was held that the plaintiff could not recover on the bill, the court remarking that the case did not differ from that of a partnership in a smuggling transaction where one advances more than his share of the money. *Webb v. Brooke*, 3 Taunt. 6. If, under a condemnation in a court of the enemy, the owner purchase his ship at a public auction, he cannot recover the money so paid from the underwriter, such a contract being a ransom and illegal. *Havelock v. Rockwood*, 8 Term, 268. This case was tried in 1799; but in *McMasters v. Shoolbred*, 1 Esp. 237, tried four years previous, Lord *Kenyon*, who gave the opinion in *Havelock v.*

Rockwood, seems to have made his decision upon a different principle. The two cases were very similar. In *Havelock v. Rockwood*, the ship had been captured by a French privateer, taken into Bergen, in Norway, and condemned by the French consul at that port, and sold at auction. In *McMasters v. Shoolbred*, the ship was taken by a French frigate and carried into Charlestown, N. A., and there sold upon the authority of the French consul. The plaintiff, in the latter case, contended that the ship having been captured, and sold by the captors, after being a month in their possession, was a total loss, for which he was entitled to recover. Lord *Kenyon* held that it was impossible to make this more than an average loss; that it had been decided that if a ship had been sunk and weighed up again, if it was restored to the owners, they had only a right to go for an average loss, and that such also was the case of ransoms; that the owners had therefore a right to recover only so much as was the amount of the injury their property had sustained, which was an average loss.

Lord *Kenyon*, in *Havelock v. Rockwood*, speaks of the purpose of the laws against ransom. He says: "I think it an important observation, made by the defendants' counsel, that, in order to procure a legal sentence of condemnation in an enemy's port, the ship must

¹ *Nesbitt v. Lushington*, 4 T. R. 783; *Hicks v. Palington*, F. Moore, 297; Dig. 14, 2, 2, 3; 1 Mag. on Ins. 64; *Beawes, Lex Mercatoria*, p. 149, tit. Gen. Av.; *Sheppard v. Wright*, *Showers*, P. C. 18.

If after such a seizure the vessel is stranded, and part of the cargo taken

by the captors at their own price, the loss cannot be recovered as for a general average; but for such part as in consequence of the stranding is damaged and thrown overboard, the insured may recover on a count stating the loss to be by stranding. *Nesbitt v. Lushington*, 4 T. R. 733.

but not intended for the benefit of other property, and consequently it is not a general-average loss.¹

Salvage paid to recaptors, being for the benefit of all persons concerned in ship, cargo, and freight, falls within the rule of general average.²

have traversed the high sea where there was a chance of a recapture by our own cruisers, in which case the owner might have had his ship again on paying salvage. These ransom acts must be considered as remedial laws; and in the construction of such acts, it is the rule to extend the remedy so as to meet the mischief, and I think that the legislature intended, in passing these acts, to prevent such a transaction as the present taking place, *because it would take away the chance of a recapture.*" The captain's being a part owner will not render a compromise, made *bona fide*, and for the best interest of all concerned, less binding upon all parties, his acts being considered as done in his character of agent of all concerned. *Waddell v. Col. Ins. Co.*, 10 Johns. 61.

¹ *Butler v. Wildman*, 3 B. & Ald. 398.

² *Spafford v. Dodge*, 14 Mass. 66; *Sansom v. Ball*, 4 Dall. 459. The principle of allowing a general-average contribution for the expenses of salvage is not confined to cases of recapture. Where a vessel was stranded and lost, except a few materials, but the cargo was saved, it was held that the expenses of salvage were general average, and that the insurers on the cargo were bound to pay their proportion of such average. *Heyliger v. N. Y. F. Ins. Co.*, 11 Johns. 85. In *Briggs v. Merch. Traders' Ass.* 13 Ad. & E., N. S. 167, a vessel, *The Joseph Alexander*, with cargo on board, abandoned by her crew at sea, was brought into harbor by salvors. The plaintiff, who was owner of the ship, applied to the Court of Admiralty, and

obtained possession of the ship and cargo on entering into recognizance as a security for the whole salvage; and he effected an insurance intended to cover the proportion of the salvage he might have to pay under the recognizance. In the policy the subject-matter of insurance was described as "average expenses per *Joseph Alexander*." The vessel then sailed, and was totally lost with the cargo on board. The plaintiff was obliged to pay the amount of his recognizance, and brought this action against his insurers. It was held that the cargo was liable to contribute a ratable portion of the salvage, and that the plaintiff, who had become liable to pay the whole salvage, had a lien on the cargo for that ratable portion, and had consequently an insurable interest in the cargo.

In *Peters v. Warren Ins. Co.*, 1 Story, 463, 468, Mr. Justice Story makes a distinction between salvage and general average as follows: "General average is commonly understood to arise from some voluntary act done, or sacrifice, or expense incurred, for the benefit of all concerned in the voyage or adventure; and then it is apportioned upon all the interests which partake of the benefit. But the mere fact that an apportionment is made of a loss between the different parties in interest, if the loss itself does not arise from some act done, or sacrifice, or expense voluntarily incurred, for the common benefit, does not make it necessarily a case of general average by our law. Salvage is properly a charge, apportionable upon all the

SECTION V. — *Of the Consequences of a Sacrifice.*

WHERE the sacrifice is voluntary and in all other respects one which calls for contribution, the loss to be contributed for may not be confined to the immediate damage or destruction which was intended or anticipated, for it extends to all those consequential damages which are caused directly by the voluntary act, and by that alone.¹

interests and property at risk in the voyage, which derive any benefit therefrom. But, although it is often in the nature of a general average, it is far from being universally true, that, in the sense of our law, all salvage charges are to be deemed a general average. On the contrary, these charges are sometimes a simple average, or partial loss. We must, therefore, look to the particular circumstances of the case to ascertain whether it be the one or the other."

¹ In *Sims v. Gurney*, 4 Binn. 513, 527, where a ship in distress, in attempting to go ashore near Cape May, struck on a ridge about four miles from it, but was afterwards taken off by the winds and currents, and brought to the shore near the Cape, it was held that not only the damage sustained on the ridge, but also at Cape May, must be the subject of general average, because the damage at Cape May was the necessary result of running on the ridge. Where a ship was stranded, and in order to relieve her the cargo was put into lighters and forwarded, and during the passage a portion of it was damaged, it was held that such a loss was a subject of general average, as the goods were exposed in the lighters for the general benefit, and as the damage was a direct consequence of such exposure. *Lewis v. Williams*, 1 Hall, 430, 451. In *Bond v. The Superb*, 1 Wallace, Jr., 355, it

was held that the removal of part of a cargo of perishable fruit in a port of necessity, for the purpose of repairs, which increased an incipient decay, and hastened a partial destruction of the fruit, did not give the owner of the cargo a claim for general average. We give the opinion of the court in full. It is as follows: "Where goods are liable to loss or deterioration which arises solely from an inherent principle of decay or corruption, the owner cannot claim for general average, notwithstanding the delay of the vessel in the port of necessity may have added greatly to that deterioration. And this for two reasons: first, because there would be an equality between the owners of perishable goods and those not perishable; and second, because the immediate cause of damage is what the French writers term *vice propre* of the article, and not a damage incurred or sacrifice made either intentionally or incidentally for the safety of the whole. And perhaps a third reason might be added, to which the facts of this case would seem to give weight, and which has caused the memorandum clause in policies of insurance. I mean, because, such commodities carrying within themselves the seeds of deterioration, it is difficult, if not impossible, to discriminate the partial injury induced by inherent causes from such as might arise within the risks undertaken.

Thus if goods of great value were brought on deck and left there for the purpose of getting out for jettison other less valu-

It is true, that where the direct and immediate cause of the damage to perishable articles is some act done for the general preservation, the owner would have the same right to claim for general average as if the goods had not been in their nature perishable. Such a case is found in *Maggrath v. Church*, 1 Caines, 196, where the damage sustained by some corn was occasioned by water that got upon it, 'in consequence of the cutting away the mast of the vessel for general preservation'; and thus the immediate cause of the damage was not the *vice propre* of the grain, but water which had got upon it by cutting away the mast. The circumstances of the case before us are different. No direct injury was received by the fruit in consequence of unloading and reloading it. The decay of the fruit had commenced before its removal; and assuming that its removal did accelerate and increase the natural progress of decay more than its pitching in the hold of the vessel would have done, still it could hardly be said that the removal was the proximate cause of the decay, and not the *vice propre* of the fruit. Yet it is the proximate cause to which the law looks. 'It were infinite,' says Lord Bacon, 'for the law to judge the causes of causes, and their impulsion one on another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.' Now if the mere delay which would undoubtedly increase the damage to these perishable articles when it had once commenced is no reason why the damage, whose immediate cause is the *vice propre*, should not be brought into general average, we can see no reason why the removal

which may have increased, not caused the injury, should have a different doctrine applied to it." Where a part of the cargo was thrown overboard for the preservation of the ship and lading in a storm, in consequence of which the residue was greatly deteriorated, it was held that the insured was entitled to contribution for the corn thrown overboard, but that the insurer was protected by the memorandum excluding from average articles perishable in their nature from any loss on what remained in specie, although it had been reduced by sea damage to less than half its value. *Saltus v. Ocean Ins. Co.*, 14 Johns. 138. Where goods are injured in consequence of a jettison, the burden is on their owner to show that the damage was thus occasioned. The *Brig Mary*, 1 Sprague, 17; S. C., 5 Law Rep. 75. If a vessel from perils of the sea is compelled to seek a port of safety, and there the cargo is necessarily landed and stored in order to repair the vessel and to enable her to proceed on her voyage, and while thus stored is destroyed by fire, it must be paid for in general average. *Ibid.* But if the cargo was landed and stored because it was damaged, or if both these causes for landing and storing the cargo concur, and it is destroyed by fire while thus stored, it is not to be paid for in general average. *Ibid.* The injury which the goods lying close to the pump receive by openings cut into the vessel to convey the water standing upon deck to the pump must be compensated for in general average. *Benecké, Pr. of Indem.* 190; *Weijtsen*, § 16. If a vessel was exposed for the common safety, and the exposure was successful in rela-

able goods which had been stowed beneath them, and the goods first taken out were washed overboard or damaged by the sea, this would be, we think, a general-average loss.¹ Or if water, thrown into a ship's hold to extinguish fire, damaged goods there, this damage would also be a general-average loss.²

Cases of this kind require the application of a principle of frequent use, but often very difficult. *Causa proxima non remota spectatur*. It may be said that, if the consequential damages are direct, they must be contributed for; not so if they are indirect. And then the question occurs, when is the cause *proximate* to the effect, and when is it *remote* from it.³ We have been obliged to consider this vexed

tion to a part of the cargo, it is immaterial whether her total loss was produced immediately by the stranding, or consequentially by placing her in a situation which effected her destruction, in order to justify a claim to contribution. *Caze v. Reilly*, 3 Wash. C. C. 298. See also *Maggrath v. Church*, 1 Caines, 196; 1 Mag. 65; *Molloy*, vol. 2, ch. 6, § 8; *Abbott on Shipping*, 476 (6th Am. ed.).

¹ See *Benecké on Average*, p. 178.

² Only that part of the cargo should be contributed for which can be shown to have been damaged exclusively by the water. The rest of the cargo is to be assumed to have been damaged by the fire, if not proved to have been damaged by the water, and is not to be allowed for. *Nelson v. Belmont*, 5 Duer, 310. Where a vessel, being on fire, was scuttled as the only means of saving it, it was held that the scuttling was a voluntary act, and the losses that resulted proper subjects for contribution, and, consequently, that every loss to ship or cargo that could be distinctly traced to the scuttling, as its proximate cause, was to be contributed for in general average. *Lee v. Grinnell*, 5 Duer, 400. In *Nimick v. Holmes*, 25 Penn. 366, the distinction between the goods already on fire and the rest of the cargo was not noticed, and it was held that all

which were damaged by water were to be contributed for. In the case of a voluntary sacrifice of a cargo of lime, for the preservation of the vessel, by scuttling her, the court held that the owners of the cargo had no claim against the owners of the ship for contribution on the principle of general average, if at the time of the sacrifice of the cargo there was no possibility of saving it. *Crockett v. Dodge*, 3 Fairf. 190. Mr. J. *Story*, in *Col. Ins. Co. v. Ashby*, 13 Pet. 340, puts a supposed case which indicates a different opinion on his part from the above. He says: "Suppose a cargo of lime were accidentally to take fire in port, and it became necessary, in order to save the ship, that she should be submerged, and the cargo was thereby totally lost, but the ship was saved with but a trifling injury; would it not be a case of contribution?"

"The injury which the goods lying close to the pump receive by openings cut into the vessel to convey the water standing upon deck to the pump must be compensated for in general average." *Benecké*, p. 190.

³ In *Potter v. Ocean Ins. Co.*, 3 Sumner 41, Mr. Justice *Story* speaks as follows upon this subject: "If the bark had become wholly unmanageable, and unnavigable from the immediate effects

question already in different connections. Here we will only say, that we know no principle which can help to answer it, but that which considers the cause to be *proximate* to the effect when no other cause must intervene to give effect to the first cause. We usually translate *remota* by *remote*, but *remota* means rather *removed*; and in the Latin rule cited, we suppose it to mean that the cause is removed from the effect when another cause comes in and more immediately works the destruction.

This rule requires certainly, as to the law of general average, this qualification, namely, that the original cause is still considered *proximate*, although an intervening and more active cause comes into play and immediately produces the loss, provided this intervening cause comes in naturally if not inevitably. As an example of this, we may refer to the case already stated, of goods taken from a laboring ship and put into a boat to be taken on shore and lost by wind or wave on the way to the land.¹ Here the only voluntary act is to put the goods safely into the boat, and the only intent is to send them safely to the shore. But, by doing this, a natural and obvious danger is incurred, which actually works their destruction. Another case which may illustrate this remark is one where, a mast being cut away, this made an opening by which water was let into the hold, and damaged the cargo; and this damage was held to require contribution.²

In a recent action in Massachusetts (the facts of which we shall state in the chapter on Partial Loss),³ where it was necessary of the storm, I do not well see how the direct results from that unmanageableness and innavigability are to be treated otherwise than as a part of the loss. The storm is still the *causa proxima*. In causes of this sort it will not do to refine too much upon metaphysical subtleties. If a vessel is insured against fire only, and is burnt to the water's edge, and then fills with water and sinks, it would be difficult, in common sense, to attribute the loss to any other proximate cause than the fire, and yet the water was the principal cause of the submersion. If a vessel be insured against barratry of the master and crew, and they fraudulently bore holes in her

bottom, and thereby she sinks, in one sense she sinks from the flowing in of the water; but, in a just sense, the proximate cause is the barratrous boring of the holes in her bottom." See also *Peters v. Warren Ins. Co.*, 14 Pet. 99; *Bond v. The Superb*, 1 Wall, Jr., 355, *supra*, p. 232, n. 1.

¹ *Lewis v. Williams*, 1 Hall, 430; *Cod. de Com. b.* 2, tit. 11, n. 238; *Dig. l.* 4, *De Leg. Rhod. Emerigon*, ch. 12, § 41, vol. 1, p. 599.

² *Maggrath v. Church*, 1 Caines, 196. *The Brig Mary*, 1 Sprague 17, *supra*, p. 232, n. 1.

³ *Gage v. Libby*. This action was founded upon the same facts as are

sary to repair a vessel laden with ice, and, as a part of the repair, to take out a decayed mast and put in a new one, and the ice was thereby wasted, the court held that the loss of the ice was a case of general average.¹

An analogous question would arise where a ship, to avoid capture or wreck, casts anchor upon a dangerous bottom, and the cable is chafed or cut by the rocks, or the anchor inextricably wedged among them, and so is lost. Is the loss of the anchor a general-average loss?² The distinction has been taken by writers that it can be so only when the anchor was dropped in an unusual place. We think this fact might be evidence that it was

stated, *post*, ch. on Partial Loss, in the case of *Libby v. Gage*. There the question was, whether there was a partial loss of freight; here it was, whether it was a case of general average.

¹ The decision is not yet published. But the rescript sent down in December, 1867, is as follows: "The ice melted and lost by admitting the air into the hole where the mast was taken out for the purpose of making the necessary repairs was a subject of general average."

² Mr. Phillips, in his work on Insurance, vol. 2, §§ 1285 and 1296, mentions two cases in which this question arose. In the first, a vessel lying in Funchal Roads was driven in a gale, and dragged her anchor nearly a mile, until she "brought up" at a short distance from a rocky shore. After the gale had somewhat abated, but while it still continued with very considerable violence, the sea at the same time setting towards the shore, the master attempted to raise the anchor for the purpose of removing to a more safe anchoring-ground. It was, however, found to be impracticable to raise it, and, to avoid the danger of the situation,—since in case of the anchor's dragging, or the cable's parting, the vessel would have gone upon the rocks,—he cut his cable. The loss of the cable and anchor was considered by referees

in Boston (of whom he was one) to be the subject of contribution, and the whole value was allowed, because it was thought that in favorable weather, when the vessel could without any immediate danger have remained in her situation, the anchor might have been recovered.

In the second case, where a vessel on a voyage from Charleston, S. C., to Cowes, had lost part of her sails and rigging, and the weather being boisterous, and it being dangerous to keep on the course, the master put out the stern anchor, the cable being made fast to a mast of the vessel, and the anchor, cable, and mast were lost by this proceeding, the damage was allowed as a subject of general average by the *despatcheur* at Lloyd's.

Benecké says, p. 190, that the damage which the goods sustain in consequence of a vessel's crowding sail is nowhere allowed in general average, and that the loss of anchors and cables, which, upon extraordinary occasions, are not cut, but in some other way exposed and lost for the preservation of the whole, greatly resembles that occasioned by crowding sail, as when a vessel, in order to avoid cliffs and shoals or a lee shore, casts anchor upon a stony ground. See Weskett, tit. Gen. Average, n. 3.

dropped there from some unusual necessity, but we should doubt whether in any case this loss could be brought clearly within the principles of general average. We have no doubt that such losses are usually paid for in practice, as general average. We should say, however, that this was but one of the many instances admitted to average by insurers, without critical inquiry into the objections.¹

¹ Magens states it as his opinion, that the insurers are liable for whatever loss or damage may accrue to a ship by the master's extraordinary endeavors for her preservation; that if, for instance, to avoid or escape from an enemy, a ship anchors in an open road, under the protection of some castle, and there parts her cable, it ought, doubtless, to be considered as a gross average, and that if the master of a ship, finding her too near a lee shore, apprehends that to save his vessel he must carry so much sail as to risk the carrying of his masts by the board, and, to save them, deliberately comes to an anchor, and a cable is lost, if it is not to be considered as a gross average, it ought at least to be made good by the insurers upon the ship. He adds that a regulation to this effect was made in Hamburg, in 1725, and that Quintin Van Weysten, a writer of great authority, in a treatise written about 1563, held that if the master of a ship had advisedly dropped anchor in rocky ground for her safety, then the breaking or losing of his anchors and cables, though it could not properly be deemed a gross average, ought to be recompensed as a good piece of service. Magens continues as follows upon the subject: "We remember also that at London, in certain cases, where it was proved that ships, endeavoring to keep clear of a lee shore, had new sails blown away and cables parted by anchoring in

open sea, to avoid driving ashore, the losses being occasioned by striving to preserve the whole, were made good by the insurers, whose interest it always is (as well as for the common advantage) to make it the master's interest to spare nothing, in such extraordinary cases, to save the ship from stranding, by carrying out fresh cables when others have parted. If a master, being himself a part owner in the ship, and fully insured, knows that he shall not be paid for the first cables he may carry out and lose by their breaking, he is discouraged from risking others, though with the appearance of saving his ship, as he may think it more for his advantage to let her go ashore on the first cable's parting, because the insurers must then pay him the full insurance; whereas, if she were saved by veering out other cables, he would lose the value of those anchors or cables that were lost or broke before. We must add that, as it is for the common good, and for the particular interest of all insurers, that ships should not go to sea without good cables, sails, &c., those cables that are not sufficiently strong for a ship to ride with in the usual loading-places, or any sails blown to pieces by stormy weather in the common course of a voyage, should not be paid for by the insurers, as it might be an incitement for masters not to go without good ones." Magens on Ins., pp. 52, 53, 54. See also Weijtsen, § 11.

So it must be said that, if a vessel cuts and loses her cable, this may or may not be a general-average loss, according to circumstances. If cut only because she cannot weigh her anchor, and must pursue her voyage, it is not a general average; but it is so if the cable were cut to avoid extreme and imminent peril of capture or wreck.¹ It may be added, that it is undoubtedly the duty of the master who cuts or unshackles his cable to attach to it, if he can, buoys, or use other means to facilitate recovery. If he failed to do this without excuse, and it appeared that the cable was lost because simple and ordinary precautions, entirely within his reach, were neglected, we should say this could not be called such a sacrifice from necessity as constituted a claim for contribution.

Such cases as these, of anchors, boats, or canvas lost, bring up at once a question frequently recurring through the whole law of general average. It is whether the loss was a mere incident to navigation, and was caused by one of the common perils to which ships are always exposed, or was a voluntary sacrifice to escape an extraordinary danger. It is not always easy to answer this question; but of the principle which must decide it, there can be no question. For it is certain that only when there is an extreme danger common to all the property, and a part of the property is destroyed, either directly and purposely, or by a danger to which it must now be exposed to save the rest, but which was never originally intended, only in such a case as this can the loss be considered a general-average loss.² This may be illustrated further by

¹ Cables cut away or anchors slipped to avoid being separated from convoy are not the subject of general-average contribution in England, though they are so on the Continent. 2 Arnould, 894; Stevens on Average, 14 (5th ed.); Emerigon, ch. 12, sec. 41, vol. 1, p. 605 (ed. 1827). It was decided by the maritime judges of Amsterdam, in the year 1661, that if a cable is cut in a storm in order to save the ship, whereby the anchor is lost, the cargo is not bound to contribute, because there was no voluntary jettison. 2 Bynkershoek, Quaest. Jur. Priv. l. 4, c. 24, p. 424.

² See *Covington v. Roberts*, 2 Bos. &

Pull. 378. Loss by shipwreck or a peril of the sea is not the subject of general average; but a loss incurred in order to save a vessel from shipwreck or a peril of the sea is. *Lyon v. Alvord*, 18 Conn. 75. If the damages to the ship arise from the ordinary occurrences of the voyage, and not from some extraordinary violence or peril, to which she has been exposed, the loss must be borne by the owner of the vessel, who engages, by his contract with the freighter, that she shall be stout, stanch, and strong, and properly equipped for the voyage; and, whether it be expressly stipulated or not, he is bound to

the following two cases. A ship being armed gives battle to a pursuing enemy and beats her off; the loss she sustains in the battle constitutes no average claim; the ship only discharged her duty, which was to carry the goods to their destination if possible. The loss was cast upon her "by the fortune of war," and must rest where it fell.¹ But where a vessel, pursued by an enemy, lowered her boat into the sea with a lantern at the mast-head and sails set,

keep the vessel in this condition during the voyage, unless prevented by some extraordinary peril, for which he can, in no respect, be responsible. *Ross v. Ship Active*, 2 Wash. C. C. 241.

¹ In *Taylor v. Curtis*, 6 Taunt. 608, which was an action to recover contribution for the expenditure in ammunition in resisting capture by a privateer, for the damage done to the ship in the combat, and for the expense of curing the wounded, *Gibbs, C. J.*, said: "The losses, for which the plaintiffs seek to recover this contribution, are of three descriptions: first, the damage sustained by the hull and rigging of the vessel, and the cost of her repairs; secondly, the expense of the cure of the wounds received by the crew in defending the vessel; thirdly, the expenditure of powder and shot in the engagement. . . . The measure of resisting the privateer was for the general benefit, but it was a part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them, and there it seems to me they ought to rest. It therefore follows that these losses were not of the nature of general average, and that the plaintiffs cannot recover." Upon this subject *Benecké* says: "It is a question not easily to be decided, whether the damage done to a vessel by the defending her against privateers or pirates be-

longs to particular or to general average.

. . . . Now if cables be cut, goods cast overboard, or the vessel run ashore, in order to escape from the enemy, the damage is universally admitted to be general average. But as these measures are intended for the preservation of the whole, so is the defence of the vessel; and it seems unjust that the loss arising from it should fall only upon one party, particularly upon the ship-owner, while the benefit accrues to the whole. It is certain that the damage occasioned by the enemy's shot is one proceeding from external causes, and against the will of the captain; but it is nevertheless the consequence of a determination to resist, and may therefore be looked upon as a damage voluntarily sustained." *Benecké on Mar. Ins.* 231 (ed. 1824). *Benecké* also mentions that the Hamburg Ordinance reckons as general average all the damage done to the vessel, her apparel, and the cargo, by good defence against enemies, privateers, or pirates, but excludes the ammunition expended in the defence; that the expense of ammunition, on the contrary, is specially included by the Prussian Ordinance; and that the Hamburg, Swedish, Prussian, Danish, and Spanish laws admit to general average the charges of healing and attending the wounded in an engagement, and also allowances to widows and orphans of the killed.

and thus deceived the enemy and escaped, the value of the boat was contributed for.¹

So, while the common expenses of convoy are not a general-average loss, it has been said that where this convoy or other similar protection was made necessary by some unexpected and extraordinary peril, the cost would be a general-average loss.²

So, if masts are blown overboard, they certainly constitute no general-average loss; but if they float by the side, hanging to the ship, and are then cut away because they embarrass the navigation of her, it has been said that the loss is now one of general average. We do not see a sufficient reason for this. If contributed for at all, it can only be on the value they possess when thus cut away, and we can hardly suppose a case in which this value would be anything.³

¹ Emerigon, tom. 1, p. 622 (Meredith's ed.), 480.

² Emerigon, tom. 2, ch. 12, sec. 41, p. 626; 2 Arnould, 913; Bynkershoek, Quaest. Priv. Jur. l. 4, c. 25; Benecké & Stevens on Av. (Phillips's ed.) 147, 151. And it has been held that, where a vessel meets with an accident at sea, and is obliged to go into port, and another vessel accompanies her for the common good, and is paid for this, it is a general-average expense. *Nelson v. Belmont*, 5 Duer, 310. It is stated by Mr. Stevens (Benecké & Stevens on Av. Phillips's ed. p. 67), that "some of the foreign ordinances say that, if a cable be cut or slipt to sail with convoy, the value shall be brought into a general contribution; but this is not the practice with us. See *Casar*. Disc. 46, n. 9.

³ *Nickerson v. Tyson*, 8 Mass. 467, 1 Mag. 181; Emerigon, ch. 12, sec. 41, vol. 1, p. 606 (ed. 1827); Ord. Copenhagen, a. 1, § 10; Ord. Königsb. a. 25. In Benecké & Stevens on Av. (Phillips's ed. p. 111), it is said, that though it is the practice in most countries to allow for the rigging so cut, in general average, at the value which it may be supposed to have had under those cir-

cumstances, yet in England no such allowance is made. For this two reasons are given. First, because it is said the rigging was then of no value at all. This reason is not adopted by Mr. Benecké, because he says it cannot be denied to be still of some value. He then goes on to say: "The true cause, as it appears to me, is, that under such circumstances, generally speaking, it would be impossible to work the vessel without cutting away the broken mast, and the rigging in which it is entangled, so that this act was not optional, but dictated by necessity, and consequently there was no sacrifice. But if such a circumstance occurred in sight of a port, which the vessel might reach without the rigging being cut, and this measure be resorted to merely to facilitate the manœuvring of the vessel, and to give her and the cargo a better chance of escaping the danger, in that case it would indeed be a sacrifice, and the rigging so cut away ought to be allowed for, at the value which it would have had if not cut away." See, further, *Lee v. Grinnell*, 5 Duer, 400; *Teetzman v. Clamageran*, 2 La. 197, and notes, *supra*.

SECTION VI.— *Of Voluntary Stranding.*

THERE is one class of cases dependent on the question whether the sacrifice be voluntary, which have been frequently litigated, and in regard to which the authorities are much in conflict. It occurs when the ship is voluntarily stranded, or thrown upon the shore. Is this loss of the ship a general-average loss, to be contributed for by the interests and property saved?

If the vessel be stranded by the mere force of the winds and waves, and against the will and efforts of the master, it is evident and certain that the loss is not a general-average loss. But let us suppose a case where it is certain or nearly certain that the vessel will be thrown upon the shore, but it is in the captain's power to choose where she shall be stranded. This may be of very great importance. Under the lee of the vessel are only rocks which make the entire destruction of property and life almost inevitable. At some distance, but within reach of the ship, is a smooth beach, and the master succeeds in casting the vessel away upon that beach, and by so doing life is saved and cargo is saved. The ship cannot be got off at all, or only at considerable cost; is the loss or is the cost of recovering the ship a general-average loss?

If we suppose that the ship cannot be got off and is totally lost, it may be easier, so far as the authorities go, to answer the question. Emerigon is clear that there is a right to contribution only when the ship is got off.¹ So it was held in Virginia in 1790,² and in 1812 in New York.³ But in 1814 a case came before Mr. Justice Washington, where a vessel was run ashore to escape capture and was totally lost. Now if she could have escaped otherwise, the loss would not have been one of general average, and, as the only choice of the vessel lay between capture and wreck, the loss would seem to come under the same prin-

¹ Emerigon, ch. 12, § 41, vol. 1, p. 600, ed. 1827 (Meredith's ed. 475), states the law as follows: "Damages occasioned by stranding are particular averages for account of the owners. But it would be general average if the stranding had been voluntarily effected

for the common safety, as we have seen above, provided always that the vessel has been set afloat again; for if the stranding has been followed by a shipwreck, it is *sauf qui peut*."

² *Eppes v. Tucker*, 4 Call, 346.

³ *Bradhurst v. Col. Ins. Co.*, 9 Johns. 9.

ciple as that of stranding where a safer place was chosen. And he held that there was no claim for contribution.¹

In 1839 the question came before the Supreme Court of the United States, and that court unanimously decided that whether the ship were lost or recovered made no difference in regard to the liability of the owners of the cargo to contribute.² The opinion was given by Mr. Justice Story, and the whole subject was very elaborately considered. The reasons upon which it rests seem to us sound, and we incline to regard this as the rule of law for this country, although it has recently been held otherwise in New York.³

¹ *Caze v. Reilly*, 3 Wash. C. C. 298.

² *Columbian Ins. Co. v. Ashby*, 13 Pet. 331.

³ *Marshall v. Garner*, 6 Barb. 394. In this case it was held that the owners of a ship involuntarily stranded cannot claim a contribution from the owners of the cargo, for the destruction of the masts and rigging, by the master, in order to save the ship and cargo, and the lives of the crew, as general average, where, although the cargo is saved, the ship is finally lost totally. The case of *Rea v. Cutler*, Sprague, 135, which was an action for contribution brought (in 1846) by the owners of the vessel against the owners of the cargo, was decided in favor of the libellant in the District and Circuit Courts for the District of Massachusetts. The facts of the case were substantially as follows: The bark *Zamora* was at anchor in Massachusetts Bay near Plymouth, in a violent gale of wind, with a high rocky coast under her lee. The anchors would not hold, and the vessel was being forced, stern foremost, towards a projecting rocky point, where the vessel and all on board must have perished. The captain made sail, slipped the cables, and endeavored to run along shore till he could find a safe place on which he might beach the vessel. While on the way the vessel

struck on a sunken rock, passed over it, and went ashore among other rocks. The lives of the crew were saved, and also the cargo, though in part damaged. The vessel was totally lost.

This case was taken, by appeal, to the Supreme Court of the United States, and was there dismissed for want of jurisdiction. *Cutler v. Rea*, 7 How. 729. A suit was then commenced in the Supreme Court of Massachusetts, which was decided in favor of the defendants. No opinion was given in court, and the case is not reported, but we understand that it was decided on the ground that, as matter of fact, the stranding was not voluntary.

Bigelow, C. J., in *Merithen v. Sampson*, 4 Allen, 192, refers to *Rea v. Cutler*, and says that it is impossible now to say on what precise ground it was decided, and that, from the fact that it was not reported, the inference is that it turned on a question of fact, and did not involve any new principle of law. He adds: "The position that no claim for contribution can be sustained by the owner of the vessel where she is totally lost is not supported by the more recent authorities, and is not reconcilable with sound principles." See also *Gray v. Waln*, 2 S. & R. 229; *Mut. Safety Ins. Co. v. Cargo of Brig George, Olcott*,

But how is it if the vessel be got off? Without stating in the text the various views given in the cases on stranding, all of which we cite in our notes, we state, as the principle which we think must govern all these cases, that there must be a voluntary sacrifice of some positive value. If then the ship must inevitably be cast upon the shore, and all that the master does is to select a place, a time, and a mode of stranding her, we should say that this is not that voluntary sacrifice which the law of general average requires, and therefore is not an average loss.¹ All that the master did was to strand in such a way as to give him a better hope of saving the ship itself, her cargo, and the lives of those on board.

Moreover, if the ship is to be contributed for, it should only be on the value which she possessed at the time, and in the condition, in which she was when the captain, abandoning all other hope,

Adm. 89; *Barnard v. Adams*, 10 How. 270; Code de Commerce, art. 425; 2 Brown, Civ. & Adm. 199; *Weskett*, p. 132, § 4, p. 255, § 4.

The point as to the liability to contribution of the cargo which is saved, when the ship is lost by the stranding, does not appear to have ever directly arisen in the courts of England. *Abbott on Shipping*, 490; *Arn. on Ins.* 903.

¹ *Benecké* says, p. 219 (ed. 1824): "If the situation of the vessel were such as to admit of no alternative, so that without running her ashore she would have been unavoidably lost, and that measure were resorted to for the purpose of saving the lives or liberty of the crew, no contribution can take place, because nothing in fact was sacrificed. But if the vessel and cargo were in a perilous but not a desperate situation, and the measure of running her ashore deliberately adopted as best calculated to save the ship and cargo, in that case the damage sustained, according to the fundamental rules, constitutes a claim for restitution." And in a recent case in Connecticut, *Ellsworth, J.*, speaks as

follows: "Now to me it seems little less than a paradox, that if a captain whose vessel is doomed to destruction by stranding should consider and select, for his compulsory going ashore, the place least perilous to himself and vessel, and least destructive to what might happen to escape the general destruction, such preference is the incurring a voluntary sacrifice which entitles him to call for contribution. 'Save himself who can,' is a maxim much more applicable to such a case. When a captain finds that his vessel must go on shore, and he exerts himself to go on in a safer place rather than a more dangerous one, he no more makes a voluntary sacrifice than when, in navigating his vessel, he chooses a safe channel rather than a hazardous one, or changes his course to avoid a rock or shoal. He does his plain duty to the general interest, to mitigate an unavoidable calamity, but not at all in any sense to make a loss by selecting a part to be sacrificed in order to insure safety to the rest. *Slater v. Hayward Rubber Co.*, 26 Conn. 139.

endeavored to choose his place; and this value would seem to be, in the case supposed, nothing.

But if the master had a substantial and valuable chance of saving his ship, and threw this chance away voluntarily, that he might make sure of saving the cargo, then the cargo should contribute to repay the loss, although the chance thus thrown away was less, and even much less, than a probability.

There are American cases undoubtedly which indicate a very different view of the subject; but we find it difficult to reconcile them with what seem to us the unquestionable principles of the law of general average. In the earliest case¹ on this subject,

¹ *Sims v. Gurney*, 4 Binn. 513. In giving the opinion of the court in this case, *Tilghman*, C. J., says: "It is not necessary that the ship should be exposed to greater danger than she otherwise would have been, to make a case of general average. It is sufficient if a *certain loss* is incurred for the common benefit." But in a later case in the same State, an entirely opposite doctrine was maintained by *Gibson*, C. J., who says: "It is not enough that there be a deliberate intent to do an act that may or may not lead to a loss; there must be a deliberate purpose to sacrifice the thing at all events, or, at the very least, to put it in a situation in which the danger of eventual destruction would be increased; and it is this deliberate purpose, combined with a view to the general welfare, which is the distinguishing feature between general and particular average. *Walker v. U. S. Ins. Co.*, 11 S. & R. 61.

Mr. Phillips, in his treatise on Insurance, vol. 2, p. 93, note, in comparing these two cases, remarks: "But C. J. Tilghman was plainly right in this proposition, for the most usual case of average for jettison is a sacrifice where the thing sacrificed is in imminent danger of total destruction, with both ship and cargo; and the more certain the destruction would be without the sacrifice, the

stronger is the claim for contribution."

It is, however, precisely here that we distinguish between the two classes of voluntary stranding. If ship, cargo, and freight are all in *imminent* danger, but the danger is only *imminent*, and a part of the property exposed to the common danger, and having the common chance of safety, is purposely destroyed to save the rest, this is clearly a case of general average. But where the ship must be wrecked at all events, and there is no chance whatever of her safety, how can she found a claim for contribution on the mere fact that one place of destruction was preferred to another? If it be said that to avoid rocks, where she must have been torn to pieces, she seeks a beach where the cargo may be saved, one answer is, that she casts away no chance of safety by seeking this place; and another is, that she gives to herself, by going there, a possibility of ultimate safety, just as she does to the cargo. We should say that the decisions have generally turned upon the question whether there was only an *imminent* danger, or whether the wrecking of the ship was certain and inevitable. And as it must seldom be the case while a vessel floats that her safety is *impossible*, — for who can say when or how the wind may change, or what it will do for

the master directed the course of the ship to a place other than that on which she would have been wrecked but for his action. She must have been wrecked at all events, and it did not appear that the place to which the master carried her was

the vessel?—the cases in which this voluntary stranding gives a claim for contribution are now much the more numerous. We believe this to be the meaning of Mr. Phillips; and think the rule well illustrated in the dissenting opinion of Mr. Justice *Daniel*, in *Barnard v. Adams*, cited in a subsequent note.

In *Col. Ins. Co. v. Ashby*, 13 Pet. 331, the jury found that the stranding was voluntary, and the point in question was not discussed by the court. Yet this case is often cited as one in which the court held, on the facts, that there was a voluntary stranding. In *Meech v. Robinson*, 4 Whart. 360, the vessel must have gone ashore at any rate, and would inevitably have been lost, together with the crew and cargo. She was run ashore in a less dangerous place, and was totally lost, but the lives of the crew, together with a portion of the cargo, were saved. It was held that this was not a case for a general-average contribution. *Walker v. U. S. Ins. Co.*, *supra*, has been supposed to confirm this case, but the distinction between them is important. In this latter case the court held, as a matter of fact, that when the captain slipped his cables, it did not appear that it was his intention to run his vessel ashore, but rather to get her out to sea, and, failing in this, he was driven on shore against his will. *Meech v. Robinson* may seem, however, to be overruled by *Barnard v. Adams*, 10 How. 270. But in this last case it did not appear that the ship would have been inevitably lost. She was drifting in a gale, towards a rocky

and dangerous part of the coast, on which, if she had struck, she must inevitably have perished, together with the crew and cargo. To avoid this peril she was steered along the coast and finally run on a beach, and all the cargo saved. This was held to be a case of general-average contribution. The vessel was not destroyed, but she was so high on the beach that it would have cost more to get her off than she would have been worth when off. A somewhat similar case came before the Circuit Court for the First Circuit in 1854. *Sturgess v. Carey*, 2 Curtis, C. C. 59. The vessel was at anchor, but in extreme danger of dragging her anchor and going to pieces, by being driven on a rocky shore by the violence of the wind and sea. To save the cargo and the lives of the crew, she was run on a beach. Contrary to expectation, the vessel was not lost, but was subsequently got off and repaired. For the expenses thereby incurred, the owners of the cargo were held liable to contribute.

In *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191, it was decided that if a vessel at anchor is in imminent peril, and there is every probability that she will soon sink at her anchors or part her cables and drive on shore, unless her cables are cut, and they consequently are cut, and the vessel is voluntarily run on shore, as the best expedient for saving life and property, the expense of getting her off is a subject of general average, and this without regard to the consideration whether the voyage is resumed, or the cargo again taken on board or not.

in any degree better adapted to save either the ship or the cargo than that to which she would have gone of herself. This was held to be a general-average loss. But we have never been able to see the reasonableness or propriety of this decision, although Mr. Justice Grier, in giving an opinion of the Supreme Court, speaks of it as having received the "unqualified assent" and the "unanimous approval" of that court.¹

¹ *Barnard v. Adams*, 10 How. 270, *supra*. In giving the opinion of the court in this case, Mr. J. Grier says, in approval of the instructions of the court below: "The court should, therefore, not be understood as saying, that if the jury believed the peril which was avoided was 'inevitable,' or that, if the jury believed that the imminent peril was *not* avoided, they should find for the plaintiffs. But rather, that if they believed there was an imminent peril of being driven 'on a rocky and dangerous part of the coast,' where the vessel would have been inevitably wrecked, with loss of ship, cargo, and crew, and that this immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured, then they should find for the plaintiffs." He says again, p. 305, speaking of the proper use of the term "sacrifice" in general average: "The offering of sacrifices was founded on the idea of vicarious suffering. And when it is said of the *jactus* that it is sacrificed for the benefit of the whole, it means no more than that it is selected to undergo the peril in place of the whole, and for the benefit of the whole. It is made (if we may use another theological phrase) the 'scapegoat' for the remainder of the joint property exposed to common destruction. The *jactus* is said to be sacrificed, not because its chance of escape was separate, but because of its

selection to suffer, be it more or less, instead of the whole, whose chances of safety, as a whole, had become desperate. The imminent destruction of the whole has been evaded as a whole, and part saved by transferring the whole peril to another part."

In a dissenting opinion, Mr. Justice Daniel speaks as follows: "I am wholly unable to perceive how, in conformity with the rules and principles above cited as constituting the foundation of general average, contribution could justly be claimed, in this instance, for the loss of the ship. For there is not a scintilla of proof in this cause tending to show a design to sacrifice the ship or anything else, nor tending to prove that the course pursued was one which, under any circumstances, could possibly have been avoided. On the contrary, the testimony establishes, as far as it is possible to establish any facts, that the stranding was the effect of the *vis major* of an inevitable necessity, that every effort was made to avoid this necessity, and that the only act of the mind apparent in the case was the determination, to repeat the language of Mr. Phillips already quoted, 'merely to steer her to a less dangerous place for stranding, when she was inevitably drifting to the shore,'—a determination not less for the benefit of the ship than for that of the cargo, and one falling within the general scope of the duty and discretion of every master or seaman."

SECTION VII. — *Of a Sale by the Master.*

THERE is another case which seems to come to some extent at least within the principles of general average. It occurs when the master in a port of distress sells a part of the cargo to raise funds to enable him to pursue his voyage, and take the ship and residue of the cargo to the port of destination. Nothing is more certain than that the master is authorized to make such a sale only by the strictest necessity.¹ We consider his powers in this respect, as to ship and cargo, more fully in treating of

¹ *Freeman v. East India Co.*, 5 B. & Ald. 617; *Myers v. Baymore*, 10 Barr. 114; *Stillman v. Hurd*, 10 Texas, 109; *Underwood v. Robertson*, 4 Campb. 138.

The right of the master, *quasi* master, to appropriate the cargo for the purpose of repairs, is at an end on the arrival of the ship at her port of destination. The cargo then becomes subject to the control of the consignees, and the master must, if deficient in funds, resort to other sources for necessities. *Union Ins. Co. v. Scott*, 1 Johns. 105.

The master is not justified in selling the cargo at a foreign port, although it be impossible to prosecute the original voyage, and although a sale of the goods is the most beneficial course for the owner. *Wilson v. Millar*, 2 Starkie, 1. This was an action on the case brought by the shipper against the ship-owners and captain, for having improperly sold a cargo of goods intrusted to them. The ship, upon a voyage to India, was captured by an American privateer, which plundered her of half the cargo. She was saved by the exertions of the master, who prevailed upon the captors to allow the vessel to be carried to Bermuda, under an engagement that they should not be considered as prisoners of war. Upon the arrival of the vessel at Bermuda, the sails had been destroyed, and the water let in, and the boats had

been taken away, and none could be built in less than three months. The cargo consisting of perishable commodities, and the captain not being able to procure seamen, he considered it to be impossible to prosecute the original voyage, and sold the remaining cargo, and transmitted the product to the owner. The case was tried before Lord *Ellenborough*, who gave the following opinion: "I think you had no right to determine the voyage and make a general sale of the cargo. Nothing but extreme necessity will warrant the master in making a sale of any part of the cargo; but here he took upon himself to break up the destination of the adventure, and to exercise a full dominion by the sale of the whole of the goods. I do not say that even extreme necessity would have warranted the master in selling the whole. He might have raised something by way of hypothecation, sufficient, probably, to defray the expenses of salvage; but he is absolutely a stranger to the dominion over the ship and goods, and is bound to send back to receive the further directions of the owner, although the consequence may not be so beneficial to the latter. To allow the master such an unlimited dominion as is contended for would tend to the destruction of all commercial adventures."

constructive total loss. Here we would only say that, however necessary it may be to raise funds, he can sell no part of the cargo for that purpose until he has exhausted all other methods. If he can raise the money on his owner's credit or his own, or by the sale of the goods of his owner, or by the sale of his owner's property, or by the bottomry of the ship, or by hypothecation of the cargo, or by a pledge of the ship and cargo, he must use these means before he is justified in selling any part of the cargo not belonging to his owner. It should be said, however, that although it might be possible to raise the necessary money by some of these other means, it could only be done at such excessive cost that even this excess might justify him in selling a part of a shipper's cargo. But it is certain that, when the interests of the ship and cargo absolutely require that money should be raised, he may sell such part of the cargo as may be necessary for this purpose, due care being taken to sell the same with the least possible loss.¹

Then the question would arise, whether this is to be con-

¹ Pope v. Nickerson, 3 Story, 491; Searle v. Scovell, 4 Johns. Ch. 218; Ross v. Ship Active, 2 Wash. C. C. 226. In the case last cited, Mr. J. Washington says: "If the owner of the ship be also owner or part owner of the cargo, the master may, in his discretion, sell a part of the cargo, in preference to borrowing at an exorbitant rate of premium; and in his choice of means, his judgment, fairly exercised, must govern him. If in none of these ways he can supply his wants, he may then go beyond the general scope of his authority as master, and may sell a part of the cargo, or hypothecate the whole. But, at all events, the necessity must be such as to connect the act with the success of the voyage, and not for the exclusive interest of the ship-owner." See also Fontaine v. Col. Ins. Co., 9 Johns. 29; Hassam v. St. L. P. Ins. Co., 7 La. Ann. 11; The Copenhagen, 1 Rob. Adm. 289, 292.

The owner of the property which has

been sold by the master for necessary repairs has a lien upon the ship for his indemnity. Valin, Com. Book 1, p. 343; Laws of Wisbuy, art. 45; Bulgin v. Sloop Rainbow, Bee, Adm. 116; American Ins. Co. v. Coster, 3 Paige, 323; Pope v. Nickerson, 3 Story, 465. Chancellor Walworth, in American Ins. Co. v. Coster, says that, "upon every principle of justice and equity, the owner of the cargo whose property is thus taken for the benefit of the ship, by way of a forced loan, has a right to look to the security of the ship as well as to the individual responsibility of the ship-owner for remuneration"; and in Pope v. Nickerson, Mr. Justice Story says: "The claim of the shippers is not reduced to a mere lien *in rem*, although I am satisfied that the shippers possess such a lien. But it is a personal claim upon the owners *pro tanto*, with the auxiliary security of the lien on the ship and freight."

tributed for. The loss would seem to resemble very much a loss by jettison.¹ It satisfies the three great requirements of the law of general average, for it is voluntary, necessary, and effectual. And we should have no doubt that the loss would be a general-average loss so far that the property and interests saved thereby should contribute for it.² It is possible that the money should

¹ See remark of Mr. J. Story in the case of *The Ship Packet*, 3 Mason, 260, *infra*, and 3 Kent, Com. 242.

² In *The Gratitude*, 3 Rob. Adm. 240, 263 (which was a case of a master hypothecating his cargo to pay for necessary repairs), Lord Stowell said the books overflowed with authorities that the master might sell part of his cargo, and that a sale of part was equivalent to the hypothecation of the whole, and was a fit subject for general average. And Lord Ellenborough, in *Dobson v. Wilson*, 3 Campb. 480, 487, expressed his opinion that if a ship should be seized for the non-payment of the Sound dues, and it became necessary to sell a part of the cargo, in order to obtain her release, this might be the foundation of a claim for general average. Where the master of a Peruvian vessel, bound from Lima to London, had sold some silver, part of the homeward cargo, at Bahia, to raise funds for repairing the ship, it was held to be a subject of general average, but that a court of admiralty, administering the ordinary maritime law of nations, has not jurisdiction to entertain questions of general average, or power to adjudicate thereon. *The Constancia*, 4 Notes of Cases, 677.

Mr. Justice Story, in the case of *The Ship Packet*, 3 Mason, 255, 260, said: "In the case of a sale of part of the cargo by the master for the necessities of the ship, the sale is in the nature of a compulsive loan for the benefit of all concerned, and to enable the ship to prosecute her voyage. It bears a con-

siderable resemblance to the case of a jettison, for the owner is deprived of his property for the common good, and to him it must be immaterial whether the loss be by a sacrifice at sea or on shore." In *Giles v. Eagle Ins. Co.*, 2 Met. 140, 144, the loss in the sale of a quantity of salt, which had been sold to pay the expenses incurred in getting off and repairing a vessel, which had been driven on shore in a gale, was compensated for in general average. In *The Schooner Leonidas*, Olcott, Adm. 12, 15, there is a dictum that where the master sells part of the cargo to supply the necessities of the ship, the owners would probably be entitled, in case the ship or owners could not satisfy their demand, to compel the other owners of the cargo to contribute according to their respective interests. In *The Mary*, 1 Sprague, 51, specie was shipped from Boston to Porto Cabello to purchase a return cargo. The vessel was obliged to put into Antigua, and while there the master, being destitute of funds, sold part of the specie for the purpose of making repairs, and the vessel proceeded to her port of destination, and thence to Boston. It was admitted that the specie should be paid for in general average, and it was held that the owners were entitled to interest on the same from the time when they would have had the benefit of it at Porto Cabello, if it had been carried forward. See also *The Hoffnung*, 6 Rob. Adm. 383; Emerigon on Maritime Loans, ch. 4, § 9, ch. 12, § 4; Con-

be raised or used for the benefit of the ship only; and in that case the residue of the cargo should not contribute.¹ And if raised and used for the benefit of the cargo only, then the ship should not contribute; and it is obvious that no such sale would come within the principles of average, if the cargo were sold because it was perishable; or for any other case or reason whatever, except to deliver from an extraordinary peril the property called upon to contribute.

In the case in which this power of the master has been most fully considered, Lord Stowell says: "The power of selling cannot extend to the whole, because it can never be for the benefit of the cargo that the whole should be sold."² We should have some doubts, however, whether this is always and strictly true, if, as is certain, the jettison of the whole cargo may be justified, and give a claim for contribution on the ship; or that the whole ship and freight may be sacrificed to save the cargo; in which case the cargo should contribute. It is at least possible to imagine circumstances which would render it justifiable in the master to sell all that the ship contains, that he might thereby

solato del Mare, ch. 104, 105, 106; Stevens on Average, 19, 24, 28, 29; Weskett on Ins., 252, 256, 259, art. 16. Where goods are sold by the captain in order to obtain funds for repairing particular-average losses, or for defraying the ordinary expenses of navigation, the loss arising from their sale must be made good by the ship-owner alone; but where they are sold for the purpose of defraying expenses or repairing losses, which are themselves of the nature of general average, the loss arising from their sale gives a claim to general-average contribution. *Hassam v. St. Louis Perpetual Ins. Co.*, 7 La. Ann. 11. Where a part of the cargo is sold by the master at an intermediate port, to make permanent repairs of damage, caused by a peril passed, and not for the benefit of all parties, the loss is excluded from general average. *Dyer v. Piscataqua F. & M. Ins. Co.*, 53 Maine, 118.

¹ Upon a policy of insurance on goods where the ship, being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair, and, in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses, it was held that the underwriter was not answerable for this loss, but that the owners of the goods were entitled to be reimbursed by the owner of the ship. *Powell v. Gudgeon*, 5 M. & S. 431. In this case, *Bayley, J.*, said: "The owner of the ship undertakes to have the ship fit to perform her voyage; and in case of accident it is the duty of the owner, and the master in place of the owner, to provide for its repair." The same principle was maintained in *Sarguy v. Hobson*, 4 Bing. 131.

² The *Gratitudine*, 3 Rob. Adm. 240.

save the ship; and in that case there can be no doubt that the ship should make compensation for the loss.¹

Supposing a sale of the cargo in a port of distress, there would be no loss and therefore nothing to be contributed for, if it brought as much as it would have brought had it reached safely its port of destination. For there is then no diminution of value, and nothing to be contributed for. If the loss be considered as standing on the same ground with that of jettison, it might be difficult to avoid the conclusion to which Mr. Stevens comes.² We appre-

¹ The following case seems to illustrate and support this principle. The United Insurance Company were insurers on the cargo and freight, and S. and twenty-two others were separate insurers on the ship, on a voyage from New York to Savannah, and from thence to Kingston in Jamaica. The ship was captured on her voyage, and carried into Porto Rico. Abandonments were made to the insurers on the cargo and freight, and to the separate underwriters on the ship, which were accepted respectively, and the sums insured paid as for a total loss. The ship was afterwards liberated, and proceeded to her port of destination, and there delivered her cargo, of which the master and T. were joint consignees. The whole of the net proceeds of the cargo were applied by them to defray the expense of the necessary repairs of the ship, and also for arming her, &c. In an action by the United Insurance Company against S., as part owner of the ship, for the net proceeds of the cargo so taken and applied for the repairs, &c., it was held, that, after the abandonment and acceptance, S. was separately answerable, and not as joint partner with the other insurers on the ship, for a proportion of the net proceeds of the cargo, applied to the necessary expenses of repairing the ship, but not for arming or increasing her com-

plement of men; and the sum that he was to pay was to bear the same proportion to the whole sum so applied that the sum subscribed by him to the policy bears to the whole amount underwritten on the ship. *United Ins. Co. v. Scott*, 1 Johns. 105.

² Stevens & Benecké on Av. (Phil. ed.) 71. Mr. Stevens here says: "But the question has arisen, — where there is a *profit* on the sale of the goods instead of a loss, — who is to have the benefit of it? This question is readily answered if we treat the case on the broad ground of considering it as a jettison, and by which we shall put the proprietor in the same situation as the proprietors of the other part of the cargo, viz. by paying him the estimated proceeds at the port of discharge, as if his goods had arrived. Thus, it is submitted, that the parties who would have borne the loss ought to receive the profit; and which will be done by deducting the proportion of the amount from the *average charges*, in precisely the same manner as the proportion of the loss is always added to them. For, it may be asked, on whose account, or rather on what account, does the master dispose of the goods? The answer is, certainly not on account of the proprietor of them. He is guaranteed against all possible loss, and therefore he can have no concern with

hend, however, that it is not to be considered, as far as this question goes, as quite the same thing as a loss by jettison. If the property of the shipper is taken and sold, and the sale is justified by necessity, the master acts as a *quasi* agent of the shipper, his agency springing from the necessity. And we should say that the shipper is entitled to the whole of the price which his goods bring, subject, in certain cases, to the requirement of contribution. If they bring less than they would have brought if they had arrived at the port of destination, we think he has a right to claim compensation from those for whose benefit he suffered this loss. Nevertheless, if they bring more, we do not think that the owners of the other interests have a right to any part of his profit. If all his goods are sold, the shipper saves nothing for which he could be called upon to contribute. But if a part only be sold, and the rest are carried forward by means of the money so raised, he is now benefited by the sale, and should contribute accordingly.

SECTION VIII. — *What Expenses come into General Average.*

HITHERTO we have considered only cases in which property was actually destroyed or sold and was contributed for. It is, however, a well-settled rule of the law of general average, that extraordinary expenditures for the common benefit are to be contributed for. But the cases turning upon the question, what are such expenses, are very numerous; and there is no part of the law of general average which has been more frequently litigated, and in regard to which the law and the practice are even now more uncertain.

It is, however, quite certain that there must be, here as elsewhere, the event of the sale. The master in fact, having no other means of raising money, takes these goods indiscriminately from the rest of the cargo, and disposes of them for the general benefit of all concerned, for the purpose of setting the ship forward on her voyage; and, by treating this as a jettison, justice is done to all parties. We are aware that the opinion of one of the learned judges of the Court of King's Bench is contrary to this; but it is submitted with great deference that it is on mistaken grounds: that learned person supposing that the owner of the ship would put the profit in his pocket, and thus that the case might occur where the master of the ship (his servant) might dispose of the cargo for his benefit."

where, a sacrifice which is voluntary, necessary, and effectual. But it would seem that not only those expenses are to be contributed for which are directly consequent upon or connected with the voluntary destruction of property, but that there may be cases in which expenses by themselves constitute a general-average loss.¹

¹ It was held in *Padelford v. Boardman*, 4 Mass. 548, that repairs generally do not go to the account of general average. See also *Ross v. Ship Active*, 2 Wash. C. C. 226; *Jackson v. Clarnock*, 8 T. R. 509; *Emerigon*, ch. 12, § 41 (Meredith's ed. p. 481). In *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, the vessel, having received damages in a storm, was partially repaired at the Balize. These repairs were considered by the court to be strictly necessary, and to be of no value to the vessel after her return home. Speaking of the general question, the court said: "As to the third question, it is contended for the defendants, that the temporary repairs should be charged to general average; and we are referred to *Plumer v. Wildman*, 3 M. & S. 482, which in several particulars resembled the case at bar. The ship had been run foul of, and so much damaged as to make it necessary to return to her port to repair, to enable her to perform the voyage; and she was afterwards completely repaired at the end of the voyage. The expenses of repairs which were made abroad, which were strictly necessary to enable the ship to perform her voyage, were placed to the account of general average. *Bayley*, J., doubted whether the repair of any particular damage could be placed to the account of general average, inasmuch as it is a benefit done to the ship. The court considered those repairs only under the account of general average which were absolutely necessary for the enabling of the ship to pursue her voyage; and all beyond

were set down to the account of the ship. Therefore, deducting the benefit, if there be any, which still results to the ship from the repair, the rest may be placed to the account of general average." In *Hassam v. St. Louis Perpet. Ins. Co.*, 7 La. Ann. 11, the vessel was injured by a storm, and put into a port for repairs. It was agreed that the voyage could not have been completed without the repairs; that the cargo could only have been sold at a great sacrifice, and that no means of transshipping and sending it on presented themselves; yet the court held that the expenses thus necessarily incurred were not the subject of general average. In *Sparks v. Kettredge*, 9 Law Reporter, 318, *Sprague*, J., said: "Often the right of the master to detain a cargo while he makes repairs is a burden upon the shipper, and is of no benefit to him, except in extraordinary cases; as where no other vessels can be procured to take it, and the cargo would perish or be of no value if left. In such a case, if the expenses of repairs exceed the benefit to the ship-owner therefrom, it is manifest that such excess should be paid by the cargo, if incurred for its benefit; but whether such payment should be made by general average or payment of the whole excess, there seems to be some diversity of opinion."

Expenses incurred in raising a sunk vessel, not for the purpose of saving the boat and crew and cargo from a common danger, but for the mere purpose of getting up the boat, so that she might be repaired, are not general aver-

As, for example, cases of capture and ransom or other expenses for release, and expenses for necessary repair, would frequently belong to this class.

In a previous part of this chapter we have spoken of a question, as frequently arising, and sometimes difficult, whether the loss was one of intentional sacrifice for the common benefit, or arose only from the ordinary perils of navigation. Closely analogous to this question is another, — also difficult and of frequent recurrence, — arising from the duties and obligations of the owner and master as to the sea-worthiness and proper navigation of the ship. Nothing can be more certain than that it is the duty of both owner and master to keep the ship always in a condition of seaworthiness, as far as this is possible, and to provide and to do all that belongs to her proper navigation; and for all this the owner is paid by his freight. That the discharge of this duty is for the common benefit constitutes no reason whatever why the owner should be paid therefor, in the whole or in any particular, otherwise than by his freight. It becomes then important, and is often difficult, to discriminate between expenses, on the one hand, which were incurred for the common benefit, but nevertheless belonged to the navigation of the vessel, and are, therefore, within that duty of the ship-owner which arises from his obligation to carry the goods safely to their destination, and which are therefore not within the law of general average, and, on the other hand, expenses of a similar character, which were incurred because an extraordinary peril, which involved all the property in a common danger, made these expenses necessary for the benefit of all the property.

Thus a vessel must often take a pilot, or it may need to be towed into a port, or money must be paid for anchors, or cables, or provisions, and the vessel must be kept in good repair, and during the repair it may be necessary to hire people to guard property, or to remove obstructions by ice or otherwise. These charges

age. *Firemen's Ins. Co. v. Fitzhugh*, 4 B. Mon. 160.

The expense of employing extra seamen in pumping, and navigating the vessel from the place where she was injured to a port of necessity, is a charge

to the general average. *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456, 469. See *Da Costa v. Newnham*, 2 T. R. 407, *Barker v. Phoenix Ins. Co.*, 8 Johns. 307; *The Copenhagen*, 1 Rob. Adm. 289, 294.

and others of a similar kind are not to be contributed for when they occur in the ordinary course of navigation, but they are to be contributed for when they are made necessary by an extraordinary peril common to all the property.

A test very commonly applied to determine this question is, whether they occur in a port of distress. It is not enough, however, to bring these expenses within general average, that the ship was obliged to deviate from her course and go into this port; for the necessity may have arisen from the insufficiency of water or provisions, or of the sails or spars. This would be the fault of the ship, and the expenses must be borne by the ship only. Such charges as we have above enumerated constitute a general-average loss only when the ship was driven into this port of distress by an extraordinary peril.

A recent case in England is quite instructive on this subject. A clipper sailing ship of 2,000 tons; with an auxiliary steam screw of 130-horse power, and carrying 550 tons of coal, sailed on a voyage from Australia to England. After eleven days she came in collision with an iceberg, and suffered so much damage in her masts and upper works on one side as practically to have lost all power of sailing. She reached Rio de Janeiro under steam alone, having nearly exhausted her stock of coal. The repairs necessary to restore her sailing powers would have cost at Rio many thousand pounds more than in England, and would have occupied several months, and the cargo would have had to be unshipped and warehoused. The captain, therefore, had only temporary repairs done (which took three days), sufficient to enable him to complete his voyage under steam alone; and in order to do this he had to purchase coal at Rio and again at Fayal. The voyage having been accomplished under steam alone, the ship-owners sought to charge the cost of the coal against shippers of cargo as general average, either on the principle that the expenditure was a substitution, beneficial to all parties, for a greater expenditure, which the captain had a right to incur by repairing at Rio, and ought to be apportioned in the same way that the greater expenditure would have been, or as an extraordinary expenditure for the general advantages of all interests concerned. It was held, that, even assuming the repairing at Rio would have been justifiable, and any of the incidental expenses chargeable against the shippers as general average,

there was no legal principle on which expenses incurred by one course could be apportioned according to what might have been the facts if a different course had been adopted. The court say further that the ship-owners, by their contract with the freighters, are bound to give the services of their crew and of their ships, and to make all disbursements necessary for this purpose. In the case of a vessel equipped with an auxiliary screw, their contract includes the use of that screw, and consequently the disbursements necessary for fuel for the steam-engine. The disaster which occurred caused the engine to be used to a much greater extent than would generally occur in such a voyage, and so caused the disbursements for coals to be extraordinarily heavy; but it did not render it an extraordinary disbursement. The case is said to be similar to that of an ordinary sailing vessel, in which, owing to disasters, the voyage is extraordinarily protracted, and consequently the owner's disbursements for provisions, and for the wages of the crew, if they are paid by the month, are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump, when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature. There was, therefore, no right to charge this item to general average.¹

Among the expenses for which contribution is sought is that of paying and maintaining the crew while the ship is seeking the port where repairs may be made or supplies procured, and while the ship is necessarily in that port. The French authorities indicate that, in their country, the question whether the cost of wages and provisions is a general-average loss cannot be considered as settled.² But if these expenses are incurred when the necessity for going into port was created by a loss which was itself a general-average loss, it seems to be conceded that the resulting expenses also come into average.

¹ *Wilson v. Bank of Victoria*, Q. B., Hilary, 1867, 2 Eng. L. Rep. 203.

² Emerigon, ch. 12, s. 41, § 5 (Meredith's ed.) 480, and Pardessus, art. 741, vol. 3, p. 228, contend that expenses attending the delay, such as wages and provisions, are subjects of general-average contribution. On the other hand, Lemonnier, who has critically examined

the subject, is of the opinion that these expenses are not to be contributed for. Lemonnier, *Ass. Maritime*, vol. 2, p. 107, 113, Paris, 1843. In this he is supported by Boulay-Paty. These authorities, however, admit that, if the going into port was caused by a general-average loss, the expenses there incurred are to be contributed for.

But it is a question whether this is the case when the original loss is not one of general average. For example, if a storm blows away the mast, it is certain that this loss is not one of general average, but it may make it necessary for the vessel to bear away and seek a port of repair; and this is done for the safety of ship and cargo. And it is then a question whether the wages and provisions are to be contributed for. In England the law seems to be not entirely settled,¹ but the latest authority, which, however, is only a dictum, would lead to the conclusion that in such a case the wages and provisions and other expenses of the detention do not constitute a general average loss, as the repairs themselves certainly would not.²

In this country, by the decided weight of authority, although not without some exceptions, these expenses would come under the law of general average from the time the vessel bore away for her port of repair, provided only that it was necessary, for the safety of ship and cargo alike, that the repairs should be made, whether the injury which created the necessity was or was not itself within the law of general average.³

This may be regarded, we think, as the settled doctrine and practice in this country. We shall give the authorities on this ques-

¹ *Lateward v. Curling*, G. H. Sittings after Trin. 1776, Park on Ins. (8th ed.) 238; *Fletcher v. Poole*, Sittings after East. 1769, Ibid. 115; *Eden v. Poole*, Sittings after Hil. Ibid. 117; *Robertson v. Ewer*, Ibid. 117; S. C., 1 T. R. 127; *Da Costa v. Newnham*, 2 T. R. 407; *Plummer v. Wildman*, 3 M. & S. 482; *Power v. Whitmore*, 4 M. & S. 141; *De Vaux v. Salvador*, 4 A. & E. 420; *Sharp v. Gladstone*, 7 East, 24; *Beawes*, Lex Merc. 171. See *post*, p. 259, n. 1, where the question as to wages in case of capture is discussed. See also *Dalglish v. Davidson*, 5 Dowl. & R. 6.

² *Hallett v. Wigram*, 9 C. B. 580. The dictum in this case is to the effect that, if the injury which led the vessel to seek a port of refuge was itself a subject for general average, then the wages

and provisions of the crew, and other expenses during the detention, are to be contributed for in general average, but otherwise not.

³ *Walden v. Leroy*, 2 Caines, 263; *Thornton v. U. S. Ins. Co.*, 3 Fairf. 150; *Henshaw v. Mar. Ins. Co.*, 2 Caines, 274; *Padelford v. Boardman*, 4 Mass. 548; *Barker v. Phoenix Ins. Co.*, 8 Johns. 307, 318; *Potter v. Ocean Ins. Co.*, 3 Sumner, 27; *Shelton v. Brig. Mary*, U. S. Dist. Ct. Mass. 5 Law Reporter, 75; S. C., 1 Sprague, 17; *Hause v. N. O. Mar. & F. Ins. Co.*, 10 La. 1; *Clark v. U. S. F. & M. Ins. Co.* 7 Mass. 365; *Peters v. Warren Ins. Co.*, 3 Sumner, 400; *Ross v. Ship Active*, 2 Wash. C. C. 226; *Bixby v. Franklin Ins. Co.*, 8 Pick. 86, more fully reported in 3 Sumner, 46, note.

tion more fully when treating of the adjustment of general average.

In one case in Massachusetts where a ship went ashore in a storm, and was got off and repaired, it was held that the wages and provisions during the time of repair did not constitute a general-average loss.¹ This case would seem to be opposed to the prevailing rule in Massachusetts. The principal reason given seems to be, that, as the crew had not been discharged, their wages and provisions were furnished to them by the ship-owner under his general duty. A better reason might have been that the vessel was repaired in the port in which or near which she had been stranded, and there was therefore no voluntary putting away for a port of repair.² The case, however, certainly seems to differ from the current of Massachusetts authority, and if it is to be considered that the expense of repair and service is excluded from general average because the service is rendered and the repairs are made in whole or in part by the crew of the vessel, we cannot think that this conclusion accords with the prevailing rule of this country.

The difficulty no doubt is that of distinguishing between cases in which the master does only his duty in repairing the vessel, and the crew do only their duty in helping him, and those in

¹ *Giles v. Eagle Ins. Co.*, 2 Met. 140.

² The case therefore comes within the exception pointed out by Mr. Justice *Sewall* in *Padelford v. Boardman*, 4 Mass. 548, 552. See also *Spafford v. Dodge*, 14 Mass. 66, 74. The answer to this will probably be, that, since the court allowed the wages of the other persons hired to get the vessel off, this showed that the expense was considered as a general-average one. This is owing to a confused understanding of the phrase "general average." Such an expense was not, strictly speaking, a general-average expense, there being no voluntary sacrifice; but, the expense having been incurred in consequence of a direct peril of the sea, a liability was thereby imposed upon the interests benefited, somewhat similar in its nature to a general average. Although this dis-

inction may appear somewhat hypercritical, yet it seems to us to be the only one by which the authorities can be reconciled; and, moreover, it is fully justified by the language of the court in *Greely v. Tremont Ins. Co.*, 9 Cush. 415, 421. In *Gazzam v. Cinn. Ins. Co.*, 6 Ohio, 71, it was held that where a vessel, insured on a time policy, was stranded on a rock, the wages of the crew during the detention were not the subject of a general-average contribution, the crew being retained under their original agreement. But where a vessel was purposely run ashore, in order to save the cargo, it was held that the wages of the crew while employed in laboring for the joint benefit of the adventure were a proper charge in general average. *Barnard v. Adams*, 10 How. 270.

which the crew are called upon by extraordinary circumstances to do extraordinary work.

If a vessel be captured, the expenses incurred in efforts to recover the property, together with those necessarily caused by the delay, constitute a general-average loss.¹ If the crew are

¹ Upon the point whether expenses incurred during a detention by capture are the subject of general-average contribution, the authorities are in conflict. Magens says, p. 67, that wages have been allowed to be general average, as well in London as elsewhere, when the continued employment of the seamen is with the sole view of being enabled to prosecute the voyage immediately on the ship being cleared. Marshall, p. 464, and Park, 287, citing Beawes, 150, concur in this view. Benecké, on the contrary, holds that these expenses are by the nature of the subject particular average, as none of the particulars requisite to constitute a general average exist, the detention not being the free determination of the master and crew, and it not being considered as a measure adopted for the benefit of the whole that the crew are retained in service, since the captain owes the services of the seamen to the shippers during the whole of the voyage, however protracted by accidental causes. Benecké on Insurance, 234.

In *Kingston v. Girard*, 4 Dall, 274, the court says: "Whether the extraordinary expense incurred for seamen's wages, provisions, &c., during the detention of the vessel, upon a capture as prize, is a subject of general average, forms an important question. . . . It is, upon the whole, a safe and the best rule to consider whether the expense is incurred for the general benefit of all the parties interested in ship, cargo, and freight. If it is, then all the parties should contribute to defray it. If it is

not (as in the cases of embargo and quarantine, where the delay and expense are submitted to merely that the vessel may earn her freight), then the party who alone enjoys the benefit should alone sustain the loss."

Where a vessel, chartered for a voyage at a certain hire by the month, was captured as prize, but afterwards restored, it was held that the costs and charges paid by the hirer in procuring the restoration of the vessel and cargo should be allowed as a general average on vessel, cargo, and freight, according to the value of each at the place of detention, but that the wages and provisions of the crew during the detention should be excluded. *Spafford v. Dodge*, 14 Mass. 66. As to wages and provisions during capture, Mr. Justice Jackson, in *Spafford v. Dodge*, states the law as follows: "As to the wages and provisions of the crew during the detention, we are unable, notwithstanding the very respectable authorities cited in support of this claim, to see any ground on which we can allow it, consistently with the established principles on this subject and the course of decisions in this State. The only case in which this charge has been allowed in an account of a general average in our courts was where it was necessary to go into port to repair damages sustained during the voyage from the perils of the sea; and the master, for that reason, voluntarily sought a port to refit. Here, it is to be observed, the delay was voluntarily incurred by the master; *the mind and agency of man were employed in produ-*

detained during a delay caused by such a necessity, that the master may have his crew ready for prosecuting the voyage if his ship

cing it; and this circumstance is deemed essential in every case of general average, in contradistinction to such unavoidable detentions and losses as arise from accident beyond the control of the master. We see no ground of distinction, in this respect, between a temporary detention occasioned by a hostile seizure, and one which is occasioned by an embargo, or by a tempest, or other common peril of the sea. . . . The ship-owner might as well claim a contribution for the wear and tear of his ship during the detention, or the owner of the cargo for the interest of his money, for the deterioration of his merchandise, or for the loss of a market, by the delay, as the owner of the freight for the extraordinary wages and provisions expended on such an occasion."

The point has, however, been generally decided otherwise. See *Leavenworth v. Delafield*, 1 Caines, 573; *Hurtin v. Phoenix Ins. Co.*, 1 Wash. C. C. 400. In *Penny v. N. Y. Ins. Co.*, 3 Caines, 155, *Livingston, J.*, who gave the opinion in *Leavenworth v. Delafield*, draws a distinction between an embargo and a capture. He says that a capture dissolves the contract, while an embargo does not, and that, therefore, in the latter case the seamen are under obligations to remain by the vessel, while in the former they are at liberty to depart, and if they remain, this is a voluntary act on their part, and their wages and provisions, therefore, are a subject of general-average contribution. Ricard, in his work on the commerce of Amsterdam, cited in *Penny v. N. Y. Ins. Co.*, assigns nearly the same reason for this distinction, as follows: "The wages of a ship, detained by an order of state, shall not

be brought into general average as in case of capture; because in the latter case the crew remain to take care of the vessel whilst she is *reclaiming*, and these charges are occasioned with the sole view of preserving the ship and cargo for the proprietors; but there is no room for such pretence in the case of an embargo; as the sovereign who lays it neither claims the ship or cargo, but only for political reasons prevents their immediate departure. Therefore, it cannot be said that the ship's company remained on board to prevent an entire loss." This distinction is shown to be incorrect in *Spafford v. Dodge*, and it is there held, that the contract is no more dissolved in the one case than in the other, and in support of this proposition the court cites *Brooks v. Dorr*, 2 Mass. 39; the opinion of Lord Kenyon in *Pratt v. Cuff*, cited in 4 East, 43; of Lord *Eldon* in *Beystrom v. Mills*, 3 Esp. N. P. Cases, 36, and other authorities. In the case of *The Nathaniel Hooper*, 3 Sumner, 542, 557, since adjudicated, Mr. Justice *Story* expresses an opinion in accordance with that in *Spafford v. Dodge*. The law laid down in Massachusetts seems, therefore, to be more consistent and better founded on principle than the New York doctrine. It has, however, been suggested by an eminent writer on this subject (see *Walden v. Le Roy*, 2 Am. Leading Cases, 1st ed. 404, 424, where the question is fully and learnedly discussed), that the inquiry is not whether a capture, under ordinary circumstances, terminates a contract of affreightment, but it is said, that "general average has its origin in the intervention of a *vis major*, introducing a new set of relations into the

be released, this would raise a somewhat different question. Still we should be inclined to say that their wages and provisions

contract for the time being, apart from the effect which it may have in abrogating it altogether; and that, whenever this is the case, a sacrifice, voluntarily made for the benefit of all, will render all liable for contribution, whether the party making it were or were not bound to pursue that course, in pursuance of the general duties of his position, or under the express or implied provisions of any previous contract." In support of this view, the illustration is given of a master being bound to cut away the masts or slip the cables of his vessel, if such a course were necessary to prevent the ship and cargo from being stranded or otherwise injured by any great disaster, "and yet," it is said, that "it has never been supposed that because his action, in this respect, was done in discharge of the obligation imposed by his position, the owners of the cargo were entitled to deny the character of general average to the loss thus occasioned, or to say, that, if what had been done were necessary for the safety of the cargo, it was done in pursuance of the prior obligations of the master and owner; and, if it were not, that no contribution could be claimed for a sacrifice which had not been beneficial."

Where a ship was captured for a supposed breach of blockade, libelled, and condemned, and the owner appealed from the sentence, and the same was reversed, it was held that the expenses incurred by him on the two trials in the courts of admiralty constituted a general average. *Dorr v. Union Ins. Co.*, 8 Mass. 494.

The wages of the master and crew during a forcible detention with a hostile purpose, though not a capture, give

a claim to general average. *Sharp v. Gladstone*, 7 East, 24.

In this case Lord *Ellenborough* remarked, that "it was for the interest of all that the ship's crew should be kept in a state to navigate her home with the cargo; and, if for the benefit of all, was it not fair that the expense should be divided proportionably?"

In France the extra wages of a crew, when a vessel puts into port and remains there to avoid an enemy, are a gross average. 1 *Emerigon*, 556. In cases of capture, the additional freight becomes gross average, and falls upon the ship and merchandise. *Cleirac*, *Jugemens d'Oleron*, art. 4, n. 4. The expenses incurred in endeavors to protect and reclaim captured property prior to the time of the composition made by the captain are to be apportioned upon the principles of a general average. *Jumel v. Mar. Ins. Co.*, 7 Johns. 424.

In *Leavenworth v. Delafield*, 1 Caines, 573, where the question was whether wages and provisions, during a detention after capture, formed a general average, Mr. Justice *Livingston* said: "When it is considered that capture is a disaster which generally happens without fault of the owner of goods or vessel, but by superior force, against which no human precaution can always provide, and that the expenses here in dispute are incurred in consequence of this *vis major*, or *casus fortuitus*, and for the common benefit of all, it is not easy to assign a reason why they should be borne by one of the parties in misfortune rather than another."

The payment of salvage upon a recapture, being for the benefit of all

should be contributed for in the same way and on the same ground as where a vessel is compelled by some extraordinary peril to seek a port of repair.

Some question has been made, whether, when the master did in fact retain the crew for the purpose above stated, but might have discharged them and obtained a new crew when ready to sail, the wages and provisions were then to be contributed for. We think, however, that the question of discharge or detention is one within the master's power and discretion, and if he exercised this discretion honestly, as the best thing he could do for all concerned, the circumstance that he might have discharged the crew would not have prevented these expenses from coming under general average; although an unquestionable waste of money, by this detention, might have the effect of throwing this expense on the ship alone.

In a case where three months' extra wages were paid under direction of the American Consul at the Isle of France by reason of his mistake of the law, it was held that this expense was not a charge of general average.¹ And if they are retained by the master only because he erroneously thought that his contract with them bound him to do so, and not as a measure proper for the safety of the ship and cargo, then their wages and provisions do not come within general average.

In one case mentioned by Mr. Phillips,² where a vessel that had met with sea damage did not go to a port of repair, but received carpenters from a public ship, and delayed some days at sea to make the repairs, the insurers in Boston paid the expenses of this delay without objection; not distinguishing the case from one where the vessel goes off her course to a port of repair. And a case is cited by Magens, where a vessel, having sought a port of repair, was frozen in there, and the expenses of the detention by the ice were a part of the general average.³

persons concerned in ship, cargo, and freight, falls within the rule of general-average. *Samson v. Ball*, 4 Dall. 459.

¹ *Dodge v. Union Mar. Ins. Co.*, 17 Mass. 471.

² 2 Phillips, Ins. 104.

³ 1 Magens, 67. He says, however, that when a ship is accidentally surprised and

frozen up by a frost's setting in sooner than expected, sailors' wages and victualling for the time she is frozen up are not to be made good by a general average, but are to be borne by the ship alone; but that the extraordinary labor of the sailors in cutting the ice away from the vessel, either to ease or to get her out, as

If the vessel be stranded not voluntarily, and expenses are incurred for getting her off, and the effort is unsuccessful, the ship alone pays for that. If the vessel be got off, then are these expenses to be contributed for? As it was the duty of the master to keep the vessel off the shore if he could, is it not as plainly his duty to get her off if he can? So, if he accidentally loses an anchor, or a sail is blown away, or a spar, or many sails and many spars, the extent of his duty, but not its character, is changed. And if the vessel is on shore, and he can get her off and carry the goods to their destination, is it not simply his duty to do so, and is not the cost of doing it his loss? So it may be argued, and our notes will show that there is some conflict in the authorities. Perhaps it may be said that the tendency of the American courts and of the American practice is to consider these expenses as a general-average loss; while that of the English courts is to charge them to the ship alone. Here, as in some other questions, the English courts seem to construe the duty and obligation of the owner and master more strongly against them than do the courts of this country.¹

it is for the common benefit, ought to be allowed in a general average.

¹ In *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1, a ship insured was accidentally stranded within a few miles of her port of destination. A, the owner of the cargo, which consisted of iron, saved part of it at his own expense. The insurers afterwards sent men on board, who endeavored without success to get the ship off, and at the same time the men employed by A saved forty tons more of the iron. The two parties of men acted separately, though sometimes assisting each other. After this the insurers contracted to pay B twenty-six hundred dollars, if he would get the ship off, and A agreed that they might offer B six hundred dollars for saving the iron, provided the ship should not be saved. B got the ship off, and brought her to the wharf with one hundred and fifty-five tons of iron on board. It was

held that the one hundred and fifty-five tons were liable to contribute in general average to the twenty-six hundred dollars, and that the rest of the iron was not; that the contract with B, having been made *bona fide*, was binding on the parties to the contribution, and that A should not be allowed to show that the iron might have been saved for a less sum than his proportion; and that aid rendered by A's men to those of the insurers might be set off *pro tanto* against any claim for compensation for assisting to save the forty tons.

If a ship and cargo are stranded, and at high water submerged, and abandoned to the underwriters, who decline to accept the abandonment, but raise the ship, take her to her port of destination, being the most convenient port for repairs, and deliver her cargo to the consignees, the cost of raising the ship and bringing her in is not a general-

The cost of the repairs themselves always rests on the ship only, unless they were of a temporary nature, and were made for the sake of the cargo, and were of no further use or benefit to the ship itself, leaving it as necessary as before to make thorough repair afterwards.¹

average charge, and is to be computed in estimating a constructive total loss. *Ellicott v. Alliance Ins. Co.*, 14 Gray, 318; *Sewall v. U. S. Ins. Co.*, 11 Pick. 90.

Where a vessel was stranded, and lighters and men were, by the agreement and consent of all parties, sent to endeavor to save the property, and the vessel was lost, except a few materials, but the cargo was saved and delivered to the consignees, it was held that the expenses of salvage, including the cost of lighters, &c., were general average, and that the insurers on the cargo were bound to pay their proportion of such average. *Heyliger v. N. Y. F. Ins. Co.*, 11 Johns. 85.

In *Bevan v. Bank of U. S.*, 4 Whart. 301, where a vessel was stranded and ice-bound in a situation of imminent peril, and a portion of the cargo, consisting of specie, was carried over the ice to the shore and by land to its destination, and delivered to the consignees, and, some weeks afterwards, the vessel arrived in safety with the remainder of the cargo, which had been in whole or in part discharged into lighters, and afterwards reshipped, it was held that the consignees were liable to contribute to the charges and expenses incurred after the landing of the specie, as general average. But in *Job v. Langton*, 37 Eng. L. & Eq. 178, and 6 El. & B. 779, it was decided, on the contrary, that the expenses of getting off a stranded ship after the cargo was transhipped and conveyed to its destination, and of conveying her to a port for repairs, were not chargeable to general

average, but to particular average on the ship alone. The court, however, in this case says: "All expenses incurred from the misadventure, till all the cargo has been discharged, confessedly constitute a general average. . . . We do not say there may not be a case where, after the fortuitous stranding of the ship and the cargo, unloaded, the expenses voluntarily incurred by the owners of the ship to get her off, and enable her to complete the voyage whereby the cargo, which must otherwise have perished, is carried to its destination, may be general average; as the stranding of a ship with a perishable cargo on a desert island in a distant region of the globe."

In *McAndrews v. Thatcher*, 3 Wallace, 347, 367, *infra*, p. 266, n. 1, the court said, upon the point under consideration: "The settled rule is, that when a vessel is accidentally stranded in the course of her voyage, and by labor and expense she is set afloat, and completes her voyage with the cargo on board, the expense incurred for that object, as it produced benefit to all, so it shall be a charge upon all, according to the rates apportioning general average." See also *Dilworth v. McKelvy*, 30 Mo. 149, *supra*, p. 205, n. 1. See *Wilson v. Bank of Victoria*, *supra*, Q. B. Hilary, 1867, 2 Eng. Law Rep. 203.

¹ 3 Kent, Com. (5th ed.) 235, 236; *Padelford v. Boardman*, 4 Mass. 548; *Ross v. Ship Active*, 2 Wash. C. C. 226; *Jackson v. Charnock*, 8 T. R. 509; *Emerigon*, ch. 12, § 41 (Meredith's ed. p. 481); *Brooks v. Oriental Ins. Co.*, 7

It is a universal rule in reference to the question, what expenses come under general average, that where these expenses are incurred for the exclusive benefit of any part of the common property, that alone is liable for them.¹ And if expenses are incurred for a common benefit, and thereafter goods which are

Pick. 259; *Plummer v. Wildman*, 8 M. & S. 482. In the case last mentioned, Mr. Justice *Bailey* said: "I doubt whether the repair of any particular damage could be placed to the account of general average, inasmuch as it is a benefit done to the ship, and if the captain could make it a general average by putting into port to repair, it would always be his interest to endeavor to do so. If, however, the repairs were merely such as were necessary to enable the ship to prosecute her voyage home, and were afterwards of no benefit to the ship, such repairs, I think, would properly come under a general average. Therefore, deducting the benefit, if there be any, which still results to the ship from this repair, the rest may be placed to the account of general average."

In a recent case, that of *Dyer v. Piscataqua F. & M. Ins. Co.*, 53 Me. 118, 122, the court speaks as follows: "To make property a subject of general average, it must have been sacrificed to avoid an impending peril, and for the benefit of all concerned. In this case it was sold to repair damage caused by a peril passed, and not for the benefit of all parties, but of one only. As we have already seen, it was the duty of the ship-owner to make these repairs, and, what is quite as important in its bearing upon the question under consideration, the repairs made were permanent, such as were needful to the vessel, and of which the owner finally had the sole benefit. If the repairs had, from the necessities of the case, been

merely temporary in their nature, made for the sole purpose of enabling the vessel to proceed to a place of safety, or where repairs could be made to better advantage, or if the money had been raised to pay the expenses caused by detention on account of a peril insured against, such as wages and provisions of seamen, loading and unloading of the cargo, or any other things from which the owners of the vessel received no particular advantage, but which were alike beneficial to all, and contracted to avoid threatening danger, such repairs and expenses, and the cargo necessarily sold to pay for such, would undoubtedly be the subject of general average. This distinction properly applied, it is believed, will reconcile all the authorities upon this question, although they are apparently somewhat contradictory."

¹ *Vandenheuvel v. United Ins. Co.*, 1 Johns. 406; *Jumel v. Marine Ins. Co.*, 7 Johns. 412; *Peters v. Warren Ins. Co.*, 1 Story, 463, 469. In illustration of this principle, Mr. Justice *Story* says, in *Peters v. Warren Ins. Co.*: "If there should be a capture of a neutral ship, solely on account of the cargo, which is owned by different persons, who are shippers, if no proceedings are had against the ship, but are against the cargo only, the expenses occasioned thereby will be apportioned upon the owners of the cargo, and are but a partial loss thereof, and not a general average; for such expenses are not for the benefit of the ship or freight, which, therefore, do not contribute thereto."

liable to contribution are landed, and delivered to the shipper or consignee, these goods are not liable for contribution for further expenses subsequently caused. We think this the obvious result of the principles of general average, although there is an American case which seems to hold an opposite doctrine.¹

¹ *Bevan v. Bank of U. S. supra*, p. 263, n. 1. This case seems to stand alone, the current of authorities supporting the principle stated in the text. The earliest case in which the point was involved was that of *Sheppard v. Wright*, Shower's Parliamentary Cases, 18, which was an appeal from a decree of dismissal of a bill in the Court of Chancery. The ship of the appellants sailed from Messina for London, laden with silk and oil, and on the voyage was chased into Malaga by an armed vessel. The latter, after being in sight three or four days, stood in for the port, as if designing to make an attack on the fort, whereupon the master advised the factor of the ship-owners of the danger, who sent him lighters, to save what he could of the cargo. Because the silk was of the greatest value, it was put on board the lighter first, with a small portion of the oil, and carried ashore. At night the French vessel left the port, whereupon no more was landed. About six days afterwards, the French fleet appeared again before Malaga, and, notwithstanding the efforts of the seamen, took the ship and carried her away. The silk was afterwards put on board another ship and delivered to the respondents at London, for which they paid the freight, &c. The appellants, being the owners of the ship and oil, brought their bill against the respondents, who were the owners of the silk, to compel contribution. But the Court of Chancery dismissed the bill, and the decree was affirmed upon appeal by the House of Lords. The

ground of the decree was, that the appellants' loss did not save the silk. The whole adventure was saved from the first peril, and the silk was not exposed to the second, by which the ship and the oils were lost. The court in *Bevan v. Bank of the U. S.*, commenting upon this case, remarks: "The decree may be correct, because it is perfectly clear that the safety or the preservation of the silks was not owing to the loss of the ship and the oil, or of either." It is difficult to see why the same reason would not defeat the claim for contribution in the case then before the court; for it is clear that the preservation of the specie was not owing to the expenses incurred after it had been landed. In the case of *Job v. Langton*, 6 El. & B. 779, S. C., 37 Eng. L. & Eq. 178, a ship, having sailed from Liverpool with a cargo on board, accidentally went ashore on the Irish coast. In order to get her off it was necessary to discharge the whole of the cargo, which was accordingly taken out and placed in store in Dublin. The ship was then got off by digging a channel for her, and employing a steam tug, and was towed to Liverpool to be repaired. The cargo was shipped in another vessel, and forwarded to its destination; but, for the purposes of the case, was to be considered as having been carried on by the original ship after she had been repaired. It was held, that the expenses after the cargo was in safety, in getting off the ship and towing her to Liverpool for repair, were not chargeable to general average, but to the ship

In a case in Massachusetts, where the expense of floating the vessel after the cargo had been landed was charged to general

alone. Lord *Campbell*, C. J., said: "We do not see how these expenses are to be distinguished from the expenses of repairing the ship when she had been brought to Liverpool, which, it is admitted, must fall exclusively on the owner of the ship or the underwriter on the ship, as particular average. If the owner of the ship was to earn the stipulated freight by carrying the cargo to Newfoundland, it was his duty to repair her and to carry her to a place where she might be repaired. Mr. Blackburn's position, that, the end in view of every maritime adventure being the arrival of the ship with her cargo at her destination, extraordinary acts done to effectuate this give rise to general average, would justify him in contending that these expenses do not constitute particular average; but, unfortunately for him, the expenses incurred in repairing the ship at Liverpool, according to this reasoning, would equally be general average; for the repairing of the ship was an extraordinary act which was necessary for the arrival of the ship with her cargo at Newfoundland, and was as much for the joint benefit of ship and cargo as bringing her to Liverpool from Malahide Bay. Under the circumstances stated, after the cargo had been safely discharged and warehoused, it does not even appear that it was for the advantage of the owner of the cargo that the *Snowdon* should be got off the strand and repaired. Of course we do not, contrary to the intention of the parties, attach any importance to the fact that the cargo was forwarded in another vessel; and we shall give our decision as if the *Snowdon*, after being repaired, had carried the cargo to its

ultimate destination. But, in the absence of any statement to the contrary, we might infer (as the fact turned out to be) that there would be no difficulty in forwarding the cargo by another vessel. . . . In the present case the owner of the ship, after the cargo was discharged, appears to us to have done nothing except in the discharge of his ordinary duty as owner, and for the exclusive benefit of the ship. Notwithstanding some expressions of Lord *Ellenborough* in *Plummer v. Wildman*, 3 M. & S. 482, 486, we consider it quite settled that, by the law of this country, the expenses of repairing the ship, or, after the cargo is safe, of bringing her to a place to be repaired, cannot, under such circumstances, be made the subject of general average." The claim for general average would seem to have been stronger in this than in the case of *Bevan v. Bank of U. S.*, because here the cargo was considered as having been carried on by the ship after she had been repaired; the cargo and ship had not been separated, as in the latter case, before the expenses were incurred; therefore it was for the interest of the cargo that these expenses should be incurred, which cannot be said of the latter case. In *Moran v. Jones*, 7 El. & B. 532, a ship was chartered to proceed from Liverpool to a foreign port. She took on board an outward cargo and sailed. She was driven on a bank, by a storm, near Liverpool; and the cargo was rescued from her, and carried to Liverpool, and there warehoused, the ship still remaining ashore in a situation of peril. Some days afterwards the ship was got off and taken to Liverpool, where she was

average, the decision may be accounted for, perhaps, by the fact that the circumstances of the case did not make it important

repaired, and again took the cargo on board, and proceeded on her voyage. The question for the court was, whether the expenses incurred, after the goods were in Liverpool, in getting the ship off, without which she could not have proceeded on her voyage or earned the chartered freight, were general average to which ship, freight, and cargo were to contribute; or were chargeable to ship alone; or were chargeable on any other principle. The court drew the inference of fact, that the whole saving of the cargo and ship was one continued transaction; and, on that hypothesis, held that the expenses were general average to which ship, freight, and cargo must contribute. The same remarks apply to this case as to that of *Job v. Langton*. The expenses were requisite to the continuance of the voyage; they were incurred before the cargo had reached its destination and become permanently separated from the ship; it was therefore for the interest of the cargo that they should be incurred. In *Nelson v. Belmont*, 5 Duer, 310, one of the questions raised was whether the specie which was transferred to the Danish brig was liable to contribution for the expenses and loss subsequently occurring. This question was there decided in the affirmative. Upon this point an appeal was taken to the Court of Appeals. The trial there is reported in 21 N. Y. 36. The decision of the court below was affirmed, but the court said: "My conclusion is, notwithstanding the case of *Bevan v. The United States Bank*, that if the owner of any portion of the cargo, even after a peril has occurred, and after a series of measures to avert it have been commenced, can succeed in so separat-

ing his own property from the rest that it is no longer in any sense at risk, he cannot be held liable to contribute to the expenses subsequently incurred. But, in order rightly to apply this rule, it is necessary to ascertain the full scope of the term 'at risk.' Physical destruction, or direct physical injury to the ship or cargo itself, is not the only risk to which property so situated is exposed. Its value depends, or at least is supposed to depend, in some degree, upon the successful prosecution of the voyage. Whatever threatens the voyage, therefore, is a peril to the entire property. Until that is broken up, unless the property claimed to be exempt is not only separated from the rest, and put in a place of present safety, but entirely disconnected with the enterprise, it must be regarded as still at risk and liable to contribute. If the voyage is not abandoned, and the property, although separated from the rest and removed from the ship, is still under the control of the master, and liable to be taken again on board for the purpose of being carried to its destined port, the relations of the several owners are in no respect changed. The common interest remains; and whatever is done for the protection of that common interest must be done at the common expense. . . . If the captain of the *Galena* had put the specie on board the brig, not in any event to be returned to him, but to be taken by the brig to its own port of destination, and the latter had then been suffered to pursue its course, the specie would clearly not have been subject to contribution for any subsequent expenditures to save the *Galena*. And notwithstanding the brig was employed to attend the *Galena* to Charleston, if

that the several interests should be treated distinctly and separately.¹

it had been distinctly understood between the two commanders that the specie was committed entirely to the custody of the Danish captain, and was in no event to be restored to the care of the captain of the *Galena*, it would then also have been exempt. But the facts do not warrant this assumption. The case states that 'the specie was put on board the brig because it was safer there, as, in case the fire broke out, it might be too late to transfer it from the ship.' The brig was to accompany the *Galena* to Charlestown, and there is nothing from which it can be inferred that it was the intention of the captain of the latter to relinquish his control of the specie. The fact that he reclaimed and took it from the brig as soon as he arrived in Charleston tends strongly to the opposite inference. It never ceased, therefore, up to that time, to constitute a part of the cargo of the *Galena*; and if the fire had been previously extinguished, and the voyage

resumed, it would of course have been again taken on board and carried forward by her." In *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1, *supra*, p. 263, n. 1, *Parker*, C. J., said: "The owners of the cargo had a right to save as much of it as they could, and ought not to be held to pay, on account of what was saved, any part of the expenses which subsequently occurred." The court in *Nelson v. Belmont* quotes this passage, and remarks: "This decision, which has been uniformly approved, appears to me to be in strict accordance with the principles upon which the doctrine of general average rests."

In a very recent case, that of *McAndrews v. Thatcher*, 3 Wallace, 347, this question came before the Supreme Court of the United States and was settled in accordance with the authorities above cited. The facts were as follows: A ship was stranded near her port of destination, and the underwriters upon her cargo sent an agent to assist the

¹ *Giles v. Eagle Ins. Co.*, 2 Met. 140. This was an action on a policy of insurance by which the plaintiffs were insured on their ship and its appurtenances to be employed in the coasting trade, and back and forth on one or more fishing voyages, the insurers not to be liable for partial loss on any articles, or on vessel or freight, under five per cent, excepting, in all cases, general average. The vessel went ashore in a storm, and the fish and barrels, and everything on board, were got on shore as soon as possible, and a survey was called upon the following morning. The crew were not dismissed, but boarded on shore and board was paid for them, after the fish and barrels were landed. By the labor

of the master and crew, and the labor of others who were hired for the purpose, the vessel was got off and fitted to sail, and she returned to her home port. Part of the outfits were sold by the master, at the place where she went ashore, to raise money to pay for getting her off, &c., he having no other means for raising money for that purpose. It was held that the labor and board of the master and crew, while getting the vessel off, were not a general average, and that the insurers were not liable therefor, but that they were liable for the labor, &c., of the persons hired to assist the master and crew, and for the loss on the sale of the outfits,—these being a general average.

A ship may be detained for other causes than the necessity of repair; and it may sometimes be difficult to determine whether

master in getting her off. The master and agent made all proper efforts to do this, for two days, when, not succeeding, and the water increasing in the hold, they began to discharge the cargo in lighters, still making efforts to save the ship. The discharge of the cargo occupied four days; by which time the whole of it was taken out — with the exception of a small portion in the lower hold which was overlooked — and taken to the ship's agents, who afterwards delivered it to its consignees, they giving the usual average bond. By the time that the cargo was thus all got off, the vessel, not assisted by being lightened, was settling in the sand, with the tide ebbing and flowing through her as she lay. The agent, considering her case hopeless, and the consignees of the ship having refused to authorize him to incur any further expense, now went away. On the next morning, and while the master was yet aboard, the underwriters on the vessel sent their agent, who got to work to float the vessel. Soon after the new agent came, the crew refused to do duty. The agent got new hands, and the crew went away. They were soon followed by the master, he leaving the vessel after the new agent had been in charge of her for four days. After six weeks' labor, and an expenditure of money somewhat exceeding her value when saved, the new agent succeeded in floating and rescuing the ship. The remnants of the cargo, in a damaged state, were delivered to its consignees. This action was brought by the owners of the ship against the consignees of the cargo for contribution for the expenses incurred after the master went away; but it was held that there was no ground for con-

tribution, as it was considered that no community of interest remained between the ship and cargo after the master left the ship. We make the following extracts from the opinion of the court: "It is an undoubted rule that goods, or any interest, are not liable to contribute for any general average or expenses incurred subsequently to their ceasing to be at risk; because all that was not actually at risk at the time the sacrifice was made or the expense incurred was not saved thereby, and no interest is compelled to contribute to the loss or expense which was not benefited by the sacrifice. . . . Where the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladed and stored in safety are not relieved from contributing towards the expenses of saving the residue, nor is the cargo, in that state of the case, relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures. . . . Such are the undisputed facts of the case, and, under the circumstances, it is not possible to hold that the ship, as subsequently got off, was, as matter of fact, saved by a continuation of the same series of measures as those by which the cargo was saved. Complete separation had taken place between the cargo and the ship, and the ship was no longer bound to the cargo nor the cargo to the ship. Undoubtedly the doctrine of general-average contribution is deeply founded in the principles of equity and natural justice,

they come under the law of general average. A useful test is frequently found in the question, whether the delay or detention was voluntary, for, if not, there can be no average. It may be said that if a master is compelled by disaster to seek a port of repair, he has no choice; this, however, is not true, for, if he chose, he might always attempt to go on his course with such means as he had. But if the ship is detained on her voyage by an embargo, there is no element of a voluntary sacrifice, and the weight of American authority, although it is not uniform, is against any claim for contribution for wages and provisions or other expenses caused by such detention.¹ So if she was necessarily delayed by quarantine,² or while waiting for convoy.³

but it is not believed that any decided case can be found where the liability to such contribution has been pushed to such an extent as that assumed by the plaintiffs." See further *The Ann D. Richardson*, Abbott, Adm. 499; *Sparks v. Kittredge*, U. S. Dist. Ct., Mass. 9 Law Rep. 318.

¹ *Penny v. N. Y. Ins. Co.*, 3 Caines,

155; *Harrod v. Lewis*, 3 Mart. La. 311; *Jones v. Ins. Co. of N. A.*, 4 Dall. 246. The decision in the last-named case has, however, been overruled. See *Ins. Co. of N. A. v. Jones*, 2 Binn. 547. Magens says that, in a war between England and Spain, a fleet of merchant ships from Carthagena and La Vera Cruz were detained by order of the

² *Stevens & Benecké on Av.* (Phillips's ed.) 165; *Emerigon*, tom. 1, p. 633; *Kingston v. Girard*, 4 Dall. 274. Upon this point Magens speaks as follows: "When in the Hamburg Ordinance, No. 983, it is said that charges occurring by any extraordinary quarantine, or unavoidable accidents, shall be brought into a general average, it must only be understood of such extraordinary charges as accrued from a voluntary endeavor for the better security both of ship and cargo, but not, as in the same ordinance, No. 901, is justly distinguished, for sailors' victuals and wages when they are under a necessity of performing quarantine with the ship, in which case the master would have been obliged to maintain and pay them, though his vessel had arrived only in ballast." 1 Mag. 67.

³ *Stevens & Benecké on Av.* (Phil-

lips's ed.) 149; *Bynkershoek*, *Questiones Juris Privati*, lib. 4, c. 25. Referring to one of the cases mentioned by Bynkershoek, where the claim for contribution toward these expenses was allowed, Lord *Tenterden* says: "In this case it is to be observed, that the master put into port to avoid an extraordinary and impending peril, and not merely as a matter of general caution to avoid the ordinary dangers always accompanying a state of warfare. And the expense thus incurred appears perfectly analogous to the cases of jettison, and to fall within the principle of the Rhodian Law. For in this case, as the learned author observes, it is clear, that there was a present and impending peril, and it is clear, also, that the voyage was delayed, not by an accident, but by design, in order to avoid the peril." Abbott on Shipping (6th Am. ed.) p. 605.

As a general rule, it may be said that no expenses of delay or detention, if the detention takes place before the voyage begins, give any claims for contribution; for this only suspends the voyage. The master is bound to have his ship in readiness. It is the duty of the owner to have his ship ready for the voyage, at the proper time, and anything which is a mere hindrance or detention of her sailing is his loss only, even if it be not his fault. It is, however, always possible that before the voyage begins, or during the detention by embargo, or quarantine, some expenses are properly incurred for the common benefit. They might come under the law of average, and certainly would do so if they were made necessary by some extraordinary exigency, and no necessity or advantage belonging to any one interest alone would have caused the expenses. So we have

Spanish court above a year at Havana, and that, notwithstanding the expense of maintaining a ship's crew there ran very high, yet the owners of the ships in Spain had no recourse against any of their insurers nor against the proprietors of the cargo; for they considered it as an accidental occurrence, or mere chance, wherewith the insurers had nothing to do. He adds: "Vernier, in examining the question whether such a detention by a foreign power ought to be brought into a general average or not, very properly replies by proposing another query, 'Why should victualling and men's wages be deemed a general average, rather than interest of money, and the damage caused to goods by such a delay?'" 1 Mag. 68. Upon the point whether wages and provisions are a subject of general average, there is no distinction between the case of an embargo and a hostile seizure. *Spafford v. Dodge*, 14 Mass. 66. These expenses during an embargo do not go into a general average, nor are they covered by a policy upon the ship. *M'Bride v. Mar. Ins. Co.*, 7 Johns. 431; *Robertson v. Ewer*, 1 T. R. 127; *Mar-*

tin v. Salem Ins. Co., 2 Mass. 429. In *Da Costa v. Newnham*, 2 T. R. 407, which was a case of a ship going into port for repairs, and the question being raised whether the wages and provisions of the crew should be compensated for in general average, Mr. Justice *Buller* said: "As to the wages and provisions, this is not like the case where a ship is detained by an embargo, where the court have said that the expense shall fall on the owner only, and the freight must bear it." See also *Pothier, Traité des Chartes-Parties*, No. 85; *Ricard, Négoce d'Amsterdam*, p. 279. Lord *Tenterden*, upon this subject, says: "And this case does not seem to fall within the principle of the Rhodian law, because here the delay does not proceed from the act of the master or persons belonging to the ship; nor is it for the general benefit." *Abbott on Shipping* (5th Am. ed.) 603. Another reason is that, in such case, neither ship nor cargo is in actual jeopardy; for as *Beawes* expresses it, "the embargoing sovereign would not have either ship or cargo, but only hinders their departure." 2 *Arnould on Ins.* 913.

said that wages and provisions and other expenses, to obtain the release of a captured vessel, are averaged, if the vessel and cargo be released.¹ This is the general rule founded upon that principle of the law of average which requires that the sacrifice should be successful. But it is here also possible that expenses may be incurred for the common benefit in such a way that they should be paid for by the whole property, although there is no ultimate release.

Where funds are so raised for the common benefit as to become a general-average loss, the interests assisted must contribute, not only for the amount raised, but for incidental expenses necessarily incurred in raising the funds, as commissions, premiums, extra interest, brokerage, and the like.² And so, if they are raised by a respondentia, or by hypothecation of the goods, instead of by the sale of them, the maritime interest must be paid.³

If the goods thus hypothecated are lost, as the owner of the goods loses nothing by the bond, that being discharged by the loss of goods, he has of course no claim for contribution.

If the master hypothecates the cargo alone for necessities of the

¹ *Jumel v. Mar. Ins. Co.*, 7 Johns. 424; *Kingston v. Girard*, 4 Dall. 274; *Leavenworth v. Delafield*, 1 Caines, 573; *Sharp v. Gladstone*, 7 East, 24. See *supra*, p. 259, n. 1.

² So stated by all text-writers; as 2 Phillips, sec. 1326; 2 Arnould, 917; *Benecké & Stevens on Av.* (Phil. ed.) 172. Interest upon the amount of a contribution for general average runs from the time the money was advanced upon which the average arose. *Sims v. Willing*, 8 S. & R. 103.

Benecké says: "The several charges, necessarily incurred in consequence of a measure taken for the benefit of the whole, must also, without contradiction, be admitted as general average. The most material of these are the expenses occasioned in raising the necessary funds in a port into which a vessel has been driven in distress. . . . So much of the charge of procuring funds as corre-

sponds with the sum actually employed for the purposes of the general average, and no more, can be admitted; and it is a gross abuse when, as is sometimes done, the whole of the charges for obtaining funds, such as marine interest, &c., are passed to the general-average account, although a part of those funds have been employed for a particular average on the vessel, or for the restitution of other partial damages. This applies also to commissions of agents, attorneys, surveyors' fees, brokerage, postage, and other similar charges." *Benecké, Prin. Indem.* 243. Where expenses have been incurred, the insurers are not liable for marine interest, but only for the ordinary legal interest on the sums advanced. *Jumel v. Mar. Ins. Co.*, 7 Johns. 412, 425.

³ *Stevens on Av.* 27 (5th ed.); *Benecké*, 283.

ship and cargo jointly, and the ship is lost, the ship-owner, who loses nothing but what he would have lost if no hypothecation had taken place, can have no claim upon the owners of the cargo for contribution. But how is it if the goods are saved and applied to the payment of the bond? It is of course admitted that if the master of a vessel, being obliged to put into a port of distress, has no money to pay for the repairs, and can raise none on the personal credit of the owner of the vessel, he may hypothecate the ship and cargo for that purpose. The question then arises in what case can the owner of the goods hypothecated call on the other shippers for a general-average contribution. If another ship can be found to take the goods on, although the master has the right to detain them till his own ship is repaired, still, in such a case, the detention would clearly not be for the benefit of the goods, and it would seem that the other shippers should not contribute; but when no other vessel can be obtained, and the ship can not proceed and complete the voyage without repairs, and there are no means of making them except by a hypothecation of the cargo, and this is done, we are strongly inclined to the opinion that the expense which is thus incurred should be made good by a general-average contribution.¹

The master, if, by reason of wreck or other cause, he is unable to carry the goods to their destination in his own ship, always may, and by the weight of American authority must, if he can, transship the goods or send them to their destination in another bottom.²

¹ This is clearly the opinion of Lord *Stowell*, in the celebrated case of *The Gratitude*, 3 Rob. Adm. 240, 264, in which, after stating that all must finally contribute in the case of an actual sale of a part of a cargo, he adverts to the case of a hypothecation of the whole, which he considers equivalent to a sale of a part, and says: "All contribute in this, as a portion of the whole value of the cargo is abraded for the general benefit, probably with less inconvenience to the parties than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance." See also *The Con-*

stancia, 4 Notes of Cases, 677; *The Ship Packet*, 3 Mason, 255.

² All the authorities agree that the master has the *power* to send the goods on in any other ship, if his own be lost, but it has been doubted whether it is his duty so to do. The question turns upon the nature of the contract made by the parties. It is admitted that the master is bound to take the goods on, if he can, in his own ship; but it has been argued that this is all, and that, if his own ship is destroyed by the *vis major*, the contract is thereby put an end to. *The Rhodian Law* (Dig. 14.2, 10.1), the *Laws of Oleron*, art. 4, and the *Laws of*

The expense incurred by doing this is not a general-average loss, but falls on the cargo or on the ship, according to the circumstances of the case.¹

There are cases in which claims for compensation arise which should be settled by the same computation as a general-average loss; but we should not give this name to them. Such might be the case where a claim arose for compensation for the destruction of property which was not at risk nor owned by any one who had an interest in ship, cargo, or freight, or even if the property was not in any sense maritime. If, for example, it should be necessary for the purpose of saving from fire a ship with her cargo, which lies immovable at a wharf, to destroy property, whether another ship, or a building, or anything else, and this is done by any one of the owners of the endangered ship or cargo, or by any person for him, it must be paid for by the party who does it; and then this payment might give rise to a claim for compensation in some form, against all the interests saved by it.

Wisbuy, art. 16, gave the master *power* to transship in such a case. Faber (Com. ad Pand.) and Vinnius (nota ad Com. Peckii, ad Rem Nauticam, 294, 295) were of opinion that the master was not bound to transship. The Ordinance of the Marine, on the other hand, held it to be the *duty* of the master to send the goods on if he could. Tit. du Fret. art. 11, Valin (tit. du Fret. art. 11), and Pothier (Charte-Partie, n. 68) hold that the master is not obliged, and that he loses only his freight for the entire voyage by his omission, to procure another vessel. Emerigon maintains the opposite, in support of the old code. Tom. 1, 428, 429. By this new code the master is obliged, if the vessel becomes disabled, to repair her, and during the time of such repair the shipper is bound to wait or pay the full freight; and if the vessel cannot be repaired, he *must* hire another; but if he cannot, *pro rata* freight is due. Code de Commerce, art. 296. The subject is also elaborately

discussed by Boulay-Paty, Cours de Droit Commercial Maritime, tom. 2, 398-405; and the views taken by Emerigon are adopted by him. Pardessus also is of the opinion that it is the duty of the master in such a case to procure another vessel. Cours de Droit Com. tom. 3, note 644. In England the point has not yet been decided. See Slipton v. Thornton, 9 A. & E. 314; Rosetto v. Gurney, 11 C. B. 176, 188, 7 Eng. L. & Eq. 461. In this country the rule seems to be well settled in accordance with the doctrine of the text. Saltus v. Ocean Ins. Co., 12 Johns. 107; Schieffelin v. N. Y. Ins. Co., 9 Johns. 21; Searle v. Scovell, 4 Johns. Ch. 218, 222; Treadwell v. Union Ins. Co., 6 Cow. 270; Bryant v. Commonwealth Ins. Co., 6 Pick. 130; Hugg v. Augusta Ins. & Banking Co., 7 How. 595, 609; Adams v. Haught, 14 Treas. 243.

¹ Heyliger v. N. Y. Firemen's Ins. Co., 11 Johns. 85. See also Lyon v. Alvord, 18 Conn. 66.

We may reverse the case, and suppose an injury inflicted upon the common property by one either in wrong or for good reason, but such as gives to all who suffer a claim for indemnity. If this claim be enforced, the expense of doing so would be so far like that of general average, that none should be entitled to their share of the benefit who did not advance or repay their share of the cost. But the right to contribution, strictly so called, does not extend beyond those who voluntarily embark in a common adventure; and if A's vessel is about to come into collision with B's, which is at anchor, and B cuts his cable, and thus avoids it, he has no claim for contribution under the law of general average against A for the loss of the cable and anchor.

SECTION IX. — *The Sacrifice must be Successful.*

THE third essential of a general-average loss, namely, that the sacrifice should be successful, rests upon a reason which is perfectly obvious. The foundation of the law of general average is, that, if A's property is saved by the sacrifice of B's property, the sacrifice having been made and intended, A should compensate B therefor. And if A's property is not saved, he is in no way benefited by the sacrifice, and is therefore under no obligation to make compensation for it.¹ The general rule itself has never been questioned, but some subordinate questions under it have been raised. If, for example, the vessel is saved by the jettison, but is afterwards lost, is contribution now due? It is said that it is due, unless the peril which caused the sacrifice was the same peril which afterwards destroyed the property that had been temporarily saved.²

¹ *Scudder v. Bradford*, 14 Pick. 13; *Bradhurst v. Col. Ins. Co.*, 9 Johns. 9; *Gray v. Waln*, 2 S. & R. 229, 255; *Sims v. Gurney*, 4 Binn. 513, 524; *Williams v. Suffolk Ins. Co.*, 3 Sumner, 510; *Rossiter v. Chester*, 1 Doug. (Mich.) 154; *Whitteridge v. Norris*, 6 Mass. 125.

² *Lee v. Grinnell*, 5 Duer, 400. In this case the sails, masts, and spars of a ship being on fire, and their destruction certain, the masts, for the preservation of the ship and cargo, were cut away. A spar which was on fire, in falling, pierced the decks, and set on fire both ship and cargo in the hold and between decks. The ship was scuttled, and sunk ten feet, when she struck bottom. Every available means was used to extinguish the fire, but without success; and she continued to burn for two days, when the fire, having reached the water's edge, was put out. The ship

It has been held to be a consequence of this rule, that, where repairs have been made which were necessary for the safety of the

was found to be so badly injured as to be unworthy of repairs, and was therefore condemned. The judges, though differing upon the question whether the cutting away of the masts, &c., was a voluntary sacrifice entitling the owners to contribution, agreed in holding that, as the effect of the cutting away was not to preserve any of the property at risk, for any period of time, from the peril in which it was involved, the loss of the masts was not a subject of general average. Judge *Duer* remarked (p. 411) that it was unnecessary to decide whether the cutting away of the masts and spars was a voluntary sacrifice of property having value; since, if a sacrifice, as it had contributed in no degree to the preservation of vessel and cargo, it was not a subject for compensation by those who had derived no benefit from the act; and Judge *Hoffman* said (pp. 421, 422): "I consider the true rule to be, that the achievement of the object designed, even for a very short period of time, will be sufficient to justify contribution, notwithstanding a subsequent loss, provided the ultimate loss results from a new peril. . . . Thus the question is, Was the peril which rendered the sacrifice useless a continuation of the same peril which led to it, or was it a new disaster? The fire, which induced the act of destruction, was transferred, with the blazing spar, from above to the hold below, and there continued and spread itself. It seems difficult to say that this was different from the continuation of the same tempest, which, by rendering the sacrifice fruitless, displaces a claim to contribution; and it follows that no claim exists in the present case for that

damage which, though caused by a voluntary act, did not in reality avert or diminish the peril."

Where the master of a vessel which was dragging her anchors towards the shore cut away the masts to prevent her drifting, and thereupon she brought up, but after about an hour drifted again and was wrecked, it was held that the cargo which was saved was not liable in general average, inasmuch as the sacrifice of the masts did not rescue it from the particular peril then impending. *Scudder v. Bradford*, 14 Pick. 13. In giving the opinion of the court, *Putnam, J.*, said: "The property saved from the danger which was immediately threatening shall be held to contribute, notwithstanding it may be lost by subsequent perils in the course of the voyage. . . . The only hope was that, by the cutting away the masts, the anchors might bring up the ship, and prevent her drifting towards the shore. If that measure had succeeded, this would have been a case for a contribution; but it did not succeed. In about one hour after the masts were cut away the ship drifted, and dragged her anchors, until she reached and was wrecked upon the rocky shore. It cannot be affirmed that the property which was saved from the wreck was saved by the means of the cutting away of the masts. The forlorn hope failed. There was no more benefit derived from cutting away the masts before she reached the shore than from the slipping of the cables afterwards. It cannot be said that the property was safe or saved during the short space of time that she was brought up. The sea continued to set and roll with violence towards the

whole property, the expenses of these repairs, and those arising from delay or deviation for the repair and the wages and provis-

shore, until the anchors were dragged as before. It was one continued peril, which was not avoided by the voluntary destruction of the masts. If the anchors had brought up the ship after the masts had been cut away, and had held her until the then impending peril had ceased, and the ship had proceeded upon her voyage, and been lost afterwards from other perils, the contribution would be due. For this general average is to be paid once or oftener, although the ship should be finally lost on the same voyage by subsequent and distinct perils. To apply this rule: suppose the claim should have been made within the hour that the anchors held the ship after the masts were cut away. The answer would be obvious. Wait, and see if the ship will ride out this perilous swell of the sea; if she does, then call for your average. If she does not, this well-intended damage to the ship must go for nothing, as no benefit or safety will be derived from it. The answer is certainly as good now as it would have been then. The sacrifice was of no avail, and cannot be the legal foundation of a claim for contribution. What was saved was saved *tanquam ex incendio*." In *Lewis v. Williams*, 1 Hall, 430, a vessel was stranded near her port of destination, and, for the purpose of relieving her, the cargo was put into lighters and forwarded. The vessel and cargo were thereby relieved from the peril they were in by the stranding, and the cargo reached its destination; but the brig was eventually lost by a new peril. During the passage in the lighters, a portion of the defendant's goods were damaged, for which he recovered contribution. The

plaintiff, having been obliged to contribute to this loss before he could get possession of his goods, now sought to recover the amount so paid, on the ground that he was not liable to contribution because the ship afterwards perished before the voyage was ended. But it was held, that as the vessel, freight, and cargo all derived security from the exposure of the defendant's goods in the lighters, the purpose for which such exposure was made was fully answered; and that, as the defendant's loss was the direct consequence of such exposure, all the parties benefited should contribute to indemnify him. The court said: "It is conceded to be a general rule that contribution is not due for a jettison, or for damage from the exposure of part of the cargo, unless the ship and remaining cargo have been rescued from the peril to which they were exposed; but it is a mistake to suppose that the ship must pursue her voyage, or arrive at some port in safety, to entitle the party whose goods have been sacrificed to contribution for the loss. If indeed the ship, after the jettison, perishes in the same storm, the rule applies, and there shall be no contribution for the goods that may be saved to the owners of those that were thrown overboard; because the object of the sacrifice, which was the safety of the ship from the storm, was not attained. But if the ship escape the peril which the jettison was intended to eschew, and is afterwards lost by another accident or disaster, the effects saved from the last disaster shall contribute to the loss or damage incurred in averting the first peril, because that sacrifice once saved them from danger."

ions expended, would constitute a general-average loss only where these repairs enable the ship to resume her voyage.¹ They must not only be needed to enable the ship to go forward and carry the cargo to its original destination, but they must be effectual for this purpose. It is not enough that these expenses were intended for the common good, but they must also result in the common benefit.

This rule has been applied in one important case, where the vessel was captured, and the voyage broken up and abandoned, but the ship returned home; and it was held that no expenditure occurring after the capture could be averaged, because none of it was successful.²

If, however, any portion of the cargo is rescued with the ship, the rescue, being successful as to this part, the cargo saved would be bound to contribute towards that part of the expense which was incurred for its benefit in common with that of the ship and freight.

A distinction has been taken between a case in which expenses have been incurred for the safety of the property by a party justified in acting as agent for the owner of the property, and a case which comes more properly under the law of general average. It may not be always easy to draw the line between these cases, but the difficulty is not in the principle itself, but in its application. If we suppose, for example, that the vessel is captured and taken into port, if the master merely as master expends money to obtain the release of the ship and cargo, and is successful, and the ship and cargo being released return home, this expense is a general-average loss;³ not so, however, if he is

If the ship survives the danger which the jettison was made to avert, and is totally lost even the next day, the goods saved shall contribute to the loss of the part thrown overboard, notwithstanding the entire destruction of the voyage. *Caze v. Reilly*, 3 Wash. C. C. 298, 305.

¹ *Williams v. Suffolk Ins. Co.*, 3 Sumner, 510, 513, 514; *Myers v. The Harriet*, U. S. Dist. Ct., East. Dist. Penn. 2 *Wharton's Dig.* p. 48, tit. Ins. 140; *Nelson v. Belmont*, 5 Duer, 310, 325.

It was said in the case last cited that

where the expenses were incurred with a view to decide in regard to the resumption of the voyage, they might perhaps be a subject of contribution; and so, where the vessel had been scuttled to save the cargo from destruction by fire, if the cargo had been afterwards taken out in order that the water might be pumped out.

² *Williams v. Suffolk Ins. Co.*, 3 Sumner, 510, 513, 514.

³ *Spafford v. Dodge*, 14 Mass. 66, 74, *supra*, p. 259, n. 1.

wholly unsuccessful, the ship and cargo not being released. But if agents of the ship-owner and the shippers in that port concur in expending money to obtain a release of the whole property, all the owners of the property captured are equally responsible for the expense, whether the efforts for release are successful or not, and it may be that the master in such a case might have authority to act as the agent of all so interested, and might so act.¹

It has been repeatedly declared, that a loss or expense, to constitute a general-average claim for contribution, must have caused the safety of the contributory property. The French code of commerce,² adopting the rule of the Roman law,³ asserts this. So say Valin⁴ and Beawes.⁵ So also it was held in Pennsylvania⁶

¹ Thus Mr. Stevens, in his work on General Average (Phillips's ed.) p. 74, says: "It will occur to every one in the habit of considering questions of this nature, that there is an essential difference between a claim for *restitution* and for *recompense*. In the former case, e. g. in that of jettison, if at any subsequent period of the voyage the remainder of the cargo be lost, there is no claim to replace that part which was jettisoned, — and the same if the *ship* be lost before the articles sacrificed were replaced. But in the case of expenses incurred with a view towards the general benefit, it is clear that they ought to be made good to the party, whether he be an agent employed by the master in a foreign port or the ship-owner himself. The former is a case lying strictly within the adventure; for if a part be sacrificed, and the remainder be lost, the whole is lost. But in the latter case the expenses are *extraneous*, and were incurred under an implied obligation of indemnity on all parties, which is one of the duties each of the parties who are joined in a sea adventure takes upon himself." The well-established doctrine is, that dis-

bursements for the common safety must be reimbursed in general average, whether the ship and cargo are eventually saved or not. See also *Spafford v. Dodge*, 14 Mass. 66, 77, *supra*, p. 259, n. 1; *Hassam v. St. Louis P. Ins. Co.*, 7 La. Ann. 11.

² Cod. de Com. l. 2, t. 12, a. 234; Ord. tit. Du Jet. a. 15.

³ Dig. 14, 2, 4, 1. "Eorum enim merces non possunt videri servandæ navis causa jactæ esse, quæ periit."

⁴ Vol. 2, p. 205, Du Jet. a. 15, and p. 207, a. 16.

⁵ Beawes, tit. Salvage, Average, &c.

⁶ *Sims v. Gurney*, 4 Binn. 513, 526.

Here a ship, being in distress, for the common safety went ashore near Cape May, damages being thereby incurred for which general average was claimed. In speaking of the requisites of such a claim, *Tilghman*, C. J., said: "It is sufficient if a *certain loss* is incurred for the common benefit. It seems at first view not very reasonable, that contribution should be asked for damage occasioned by an act which in fact was for the benefit of the ship. But the law is certainly so, provided the act which occasioned the damage was conducive

and in Massachusetts,¹ and indeed similar language is frequently used. And yet the rule seems to require some qualification. If we suppose the ship on shore under the circumstances which require a jettison, and this jettison is accordingly made, and then by some extraordinary rise of the tide, or favorable action of the wind, the ship is got off in safety, and it is plain that the ship and cargo would have been saved as well without the jettison, this rule would determine that the jettison should not be contributed for. We must agree with Marshall, "this is quite unreasonable and unjust."² In a case decided by Mr. Justice Washington, he asserts, as it seems to us with great reason, that "the principle fairly to be extracted from the maritime law is, that the part saved shall contribute, provided the object for which the sacrifice was made was attained."³

to the common safety. . . . But did the standing towards Cape May conduce to the common benefit? It is extremely difficult to say whether it did or not. One thing, however, is certain, that, as the matter turned out, the crew and cargo *were entirely saved*. Whether that would have been the case, had any other course been pursued, it is impossible to decide with absolute certainty. It was a question, however, very properly submitted to the jury, and they have found in the affirmative. Taking it, then, that the ship was run upon the ridge with a view to the common good, and that it was conducive to the common good, it follows that not only the damage sustained on the ridge, but also at Cape May, must be the subject of general average, because the damage at Cape May was the necessary result of running on the ridge."

¹ *Scudder v. Bradford*, 14 Pick. 13, *supra*, p. 276, n. 2. In stating what was essential to sustain a claim for contribution, the court said: "It must be proved that the sacrifice was necessary and voluntary; it must be intended for the safety of all concerned,

and it must appear that thereby the property which is to contribute was rescued from the imminent peril then impending."

² Marshall on Insurance (London ed. 1802), p. 462.

³ *Caze v. Reilly*, 3 Wash. C. C. 298, 302. In this case, a schooner, on a voyage from France to Philadelphia, being chased by a British frigate, and her capture being deemed inevitable by the captain, was, with the advice of the officers and crew, run on shore at Long Branch, N. J. Before the enemy could board her, a large part of the cargo was saved, after which she was burnt. The master claimed to retain the goods saved, as subject to freight, general average, and expenses, and the claim was allowed. The court, after stating the principle quoted in the text, continues: "This principle is not inconsistent with the rule contended for, by the plaintiffs' counsel, that if a jettison be made, and the ship saved, there shall be contribution; but if the ship be lost, there shall be none. That rule is correct in all its parts, when applied to a mere case of jettison. But the principle of it is

It would seem that this was a material qualification of the rule requiring the object for which the sacrifice is made to be attained *by means of that sacrifice*. We think the general use of language to the contrary has arisen from the fact, that in a vast majority of the cases in which property is sacrificed to save the rest, and the rest is saved, it is saved by means of the sacrifice.

SECTION X. — *The Sacrifice must be Necessary.*

WHERE the sacrifice of property is not called for as a means of escape from impending peril, it is mere waste and wrong-doing, and of course can give no claim for contribution.¹ Formerly,

equally applicable to a loss voluntarily incurred by the ship, for the common safety, if safety be thereby attained. . . . The reason assigned in the Rhodian Law, why contribution should be made, in case of a jettison of goods, is so entirely applicable to that of loss, or injury incurred by the vessel, under the same circumstances, that it becomes those who would distinguish them to point out the difference. That reason is, that all should contribute to a loss, occasioned by the jettison, for the sake of lightening the vessel, because it was done for the benefit of all. If so, and the ship expose herself to loss, for the sake of obtaining safety for all, and, in consequence of such voluntary exposure, she is lost, why should not all contribute to repair the loss?"

¹ The *Gratitudine*, 3 Rob. Adm. 240, 258. Mr. Justice *Curtis*, in *Lawrence v. Minturn*, 17 How. 100, 110, speaking of the necessity which would authorize the master to make a jettison, said: "If he was a competent master; if an emergency actually existed calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill

and discretion, with no unreasonable timidity, and with an honest intent to do his duty, — the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person to whom the law has intrusted authority to decide upon and make it has duly exercised that authority." On the other hand, there is a dictum by *Coulter, J.*, in *Myers v. Baymore*, 10 Barr, 114, 118, to the effect that if the goods are thrown overboard unnecessarily by the master, although he acts with the most honest intention of saving the vessel, there is no claim for general average. Although this is the law relative to the power of the master to sell the vessel, we should doubt its applicability to the case of a jettison. In *Lawrence v. Minturn*, the vessel had met with a gale and was severely strained by the weight of the deck load. After the gale abated, and when the sea was calm, and the vessel in no immediate danger, the master, officers, and crew made a protest, setting forth the above facts, and asserting that the deck load was unsafe, and that it should be thrown over as soon as possible. This was accordingly done. It appeared that the goods were of such a nature that they could not be

to guard against this waste, the master was obliged to consult his officers and crew in a formal manner, and only by their consent was he justified in making a jettison of the cargo.¹ But the rule has passed away, and the practice is almost if not quite unknown.² One reason may have been that in those ages the

thrown overboard without the greatest risk, when there was any considerable sea. It was held, that the jettison was justifiable. The court said: "Precaution against dangers which are certain to occur is surely proper. That they must experience gales and heavy seas at that season, in that voyage, was so nearly certain, that it was not unreasonable to act on the assumption that they would occur, and prepare the ship to encounter them while in a smooth sea, when alone they could do so." In *Bentley v. Bustard*, 16 B. Mon. 643, it was held, that if a boat runs on a known obstruction, or upon the shore, without being driven on by the violence of the wind or the force of the current, and the running on could have been prevented by proper care and skill, a jettison will not be justified, although, the boat being on, it is the only way of getting her off; but the owners of the boat are liable for the value of the goods thus thrown overboard.

¹ See authorities cited in *Emerigon*, ch. 12, § 40 (Meredith's ed. pp. 469, 470), and in *The Nimrod*, Ware, 9. In the case of *The Nimrod*, Ware, J., says: "Undoubtedly the master, before proceeding to throw overboard any part of his cargo, is bound in common prudence, if the case is such as will admit of deliberation, to consult with the most skilful and experienced men of the ship's company, and to allow to their advice all the consideration it merits. But the law gives him the authority and imposes on him the obligation for the government of the ship. It presumes that

his judgment is superior to that of others of the ship's company, and when he consults them, their opinions are, in the language of *Emerigon*, rather to be weighed than counted. The advice of his crew alone would not, I apprehend, excuse him for a sacrifice which was clearly uncalled for by the danger; nor would it, if he acted against it, render him responsible for a sacrifice which was manifestly required for the common safety."

² Ch. Kent says: "Consultation is not indispensable previous to the sacrifice. A case of imminent danger will not permit it. But it must appear that the act occasioning the loss was the effect of judgment and will; and there may be a choice of perils when there is no possibility of safety." 3 Kent, Com. 233.

The rule of consulting the crew upon the expediency of making a sacrifice is rather founded in prudence, in order to avoid dispute, than in necessity; it may often happen that the danger is too urgent to admit of any such deliberation. *Birkley v. Presgrave*, 1 East, 220, 228. Says Chief Justice *Tilghman*: "It has been said that there must be a previous consultation, but this may be doubted. Consultation, indeed, is demonstrative proof that the act was voluntary. But I should think that if it sufficiently appears that the act occasioning the loss was the effect of judgment, it is sufficient. For in time of imminent danger immediate action may be necessary; and consultation may be destruction." *Sims v. Gurney*, 4 Binn. 513, 524. See also *Col. Ins. Co. v. Ashby*, 13 Pet. 331,

seamen were more nearly on an equal footing in character and interest than they now are.

Through the whole law of shipping there runs in these days an acknowledgment that the master of a ship must possess peremptory authority. The statutes of the United States protect the safety of the crew against the peril of unseaworthiness by providing that, on the complaint of the mate and the majority of seamen, the condition of the vessel may be ascertained by a regular survey.¹ Nowhere else do they provide for, or suggest, a joint action of the crew and the officers of the ship, and this seldom occurs in fact in any case; and it has been distinctly adjudged, by a court of high authority in matters of shipping, that it is the duty of the master alone to determine when it is necessary to sacrifice a portion of the cargo for the safety of the residue.² It has been said that, where a consultation was had with the crew, the only effect of this as matter of evidence was, that the jettison was made deliberately, but not that it was necessary.³

Cases turning upon the question of necessity are rare, for

343; *Nimick v. Holmes*, 25 Penn. St. 366, 372.

¹ Act of July 20, 1790, ch. 56, § 3, 1 U. S. Stats. at Large, 132; Act of July 20, 1840, ch. 48, §§ 12, 13, 14, 5 U. S. Stats. at Large, 396. The former of these acts provides that if the mate or first officer under the captain, and a majority of the crew of any vessel bound on a voyage to a foreign port, shall, before the vessel has left the land, require the sea-worthiness of the vessel to be inquired into, the master shall stop at the nearest port for the purpose of having such inquiry made. On the construction of this act, *Ware, J.*, remarked in the case of *The William Harris, Ware*, 367, 373, that the reason of the law applied as strongly to the case of a vessel departing from a foreign port on her return, as leaving her home port on a foreign voyage. This is now settled by the statute of 1840. By this

act the consul or commercial agent at the foreign port is directed, on complaint being made in writing by any officer and a majority of the crew, to appoint two persons to inspect the vessel, &c. By the act of 1850, ch. 27 § 6, 9 U. S. Stats. at Large, 441, the act of 1840 is so far amended as to require the complaint to be signed by the first or the second and third officers and a majority of the crew. If the crew, instead of availing themselves of their statute remedy, suffer the owner to repair the vessel of his own accord, and he employs an agent who pronounces her sea-worthy, they cannot refuse to proceed on the ground that the repairs are insufficient, if they are not so in fact. *Porter v. Andrews*, 9 Johns. 350.

² *The Nimrod, Ware*, 9, 15.

³ *Bentley v. Bustard*, 16 B. Mon. 643, 695.

there is usually a strong disposition on the part of the master to preserve the property under his charge. Some question has arisen on the degree of the necessity which would authorize a master to make a jettison. It came before the Supreme Court of the United States, and the decision given by Mr. Justice Curtis states the rule with a precision and accuracy which would seem to leave no doubt.¹ The master must have a large discretion in the matter; and if it were clear that he intended to do his duty, this fact would go far in justifying his actions.

At the same time it must be remembered, that where a jettison is justified by the circumstances under which it takes place, and these circumstances were caused by the fault of the master, or his want of care or skill, the jettison would give no claim for contribution; but the owners of the ship would be liable to the owners of the goods jettisoned for the damages caused by the wrong-doing of their master.²

So too it has been held, that if the unseaworthiness of the vessel at the time of sailing caused, or materially contributed to cause, a necessity for the jettison, the loss is not a general-average loss.³ The ship undertakes to carry and deliver the goods safely, with only the exception of the perils of the sea. Unseaworthiness is not a peril of the sea, and for the damage caused by it the ship is responsible to the shipper.⁴

¹ *Lawrence v. Minturn*, 17 How. 100, *Brig William Henry*, 4 La. 223; *Emory v. Hersey*, 4 Greenl. 407, 110, *supra*, p. 282, n. 1.

² For instance, if the master carries goods on deck, without the consent of the shipper, and it becomes necessary, from stress of weather or the dangers of the seas, to sacrifice the deck load for the common safety, this does not present a case for contribution, but the master is personally responsible for the loss, and, through him, the ship, it having been occasioned by his own fault. *The Paragon*, Ware, 326, 335.

³ *Dupont de Nemours v. Vance*, 19 How. 162, 166. See also *Lawrence v. Minturn*, 17 How. 100, 110; *Chamberlain v. Reed*, 13 Me. 357.

⁴ *Reed v. Dick*, 8 Watts, 479; *El-liott v. Rossell*, 10 Johns. 1; *Whitall v.*

In *Putnam v. Wood*, 3 Mass. 485, *Parker, J.*, says: "It is the duty of the owner of a ship, when he charters her or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety; and he is to keep her in that condition, unless prevented by perils of the sea or unavoidable accident. If the goods are lost by reason of any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter, upon the principle that he tacitly contracts that his vessel shall be fit for the use for which he thus employs her."

If a vessel founders, the carrier must

The sacrifice must be necessary, and the necessity must be a pecuniary necessity; for property can be called on to contribute only for that loss which was intentionally incurred for the purpose of saving that property. A very peculiar case of much interest has been recently decided in Massachusetts, which strongly confirms the doctrine, that a sacrifice of property is not a subject of general average, and cannot found a claim for contribution, unless it is made for the purpose of saving the vessel, cargo, and freight from a peril impending over them. Stronger moral grounds for the sacrifice, we may say a stronger moral necessity, cannot exist than in this case; but it was deemed wholly insufficient. The bark *Fredonia* encountered on the high seas an emigrant ship, full of passengers, and almost in the act of foundering. The bark had a full cargo of fruit. The passengers whom it could rescue were about three hundred in number. It could not take them on board and bring them into port, with safety to them or to the bark and its crew, without making some room for them in the hold of the bark, by throwing over a part of the cargo. This was done; and in the action of *Charles W. Dabney v. The New England M. Ins. Co.*, the question was raised, Was he entitled to contribution for his cargo thrown over? The Superior Court decided for the plaintiff. Exceptions were taken and carried to the Supreme Court, when judgment was ordered for the defendants. The case is not yet reported, nor a full opinion given; but the rescript is as follows: "The facts show that the immediate motive and cause of the jettison were not to preserve or restore the navigability of the vessel insured, but to make room for and receive on board the passengers and crew of another vessel, which was in imminent danger of foundering at sea with all on board. The jettison cannot therefore be deemed to have been a sacrifice of a part of the cargo for the purpose of obtaining safety from a peril impending over the vessel insured,

prove that she was sea-worthy, before ocean. But if the facts of the loss are he can bring himself within the excuse such that it may fairly be attributed of its being the act of God; but she to inevitable accident, and the owner of need only be sea-worthy for the trade the goods means to allege that the vessel in which she is employed. That which was not sea-worthy at her departure, would constitute sea-worthiness for a the burden of proof is upon him, and short voyage upon the lakes may not be sea-worthiness for a voyage upon the not on the carrier. *Bell v. Reed*, 4 Binn. 127.

and the cargo and freight. There was not a general-average loss entitling the owner of cargo to contribution."

SECTION XI. — *Where the Property Sacrificed would have been inevitably lost.*

A PRINCIPLE has been presented on this subject by a text-writer of high authority, which, however, has but little support from the decided cases. Benecké says: "If the master's situation were such that, but for a voluntary destruction of a part of the vessel, or her furniture, the whole would certainly and unavoidably have been lost, he could not claim a restitution, because a thing cannot be said to have been sacrificed which had already ceased to be of any value."¹ We cannot think that this opinion of Benecké rests upon any good reason; and if applied in the terms in which he expresses it, it would exclude nearly all the cases which are regarded both in law and in practice as general-average losses. Indeed, those cases may be generally described as cases in which ship and cargo are exposed to a common peril by which the whole would be certainly and unavoidably lost, unless a part be sacrificed to save the rest; and, the sacrifice being made, the residue or a part of it is saved.

One of his reasons seems to be, that, if the thing sacrificed be contributed for, this contribution must be measured by its value at the time the sacrifice was made, and where it would be inevitably lost by the peril if not voluntarily lost, its value must therefore be at that time nothing. But this view rests upon an obvious fallacy. All parts of the property will be inevitably lost unless some part is sacrificed. By this sacrifice the residue may be saved. And as each part has the chance of being saved by the sacrifice of some other part, each part then has a value; and if the sacrifice be made, whatever is saved contributes, and its contributory value is its value when saved.

It may be true that, if the thing which is purposely destroyed could not itself by any means whatever be saved, then it may be said that there is no voluntary sacrifice at all, for only that destruction was hastened which could not have been prevented. Such a principle may account for the case where a vessel laden

¹ Stevens & Benecké on Average (Phil. ed.) 110.

with lime was hauled out into the stream, and there scuttled, because the lime was on fire.¹ When the water poured into the vessel, the lime was destroyed at once. The ship was saved, but did not contribute for the loss of the lime, because the lime could not possibly have been preserved, and the ship was saved by only hastening its destruction.

This rule cannot, however, apply to cases in which a vessel must be somehow lightened, and only those goods which lie directly under the hatches can be thrown over, because at the time they only can be reached. It might be said that these goods could not possibly be saved in any way; and if not jet-tisoned, they, with the ship and the rest of the cargo, would have been lost. Nevertheless, this would certainly be a general-average loss.

¹ *Crockett v. Dodge*, 3 Fairf. 190. This case proceeds entirely on the ground that the lime, at the time the vessel was scuttled, was worthless, and therefore does not differ from the principle, before laid down, that goods are to be contributed for only at the value they had at the time of the sacrifice. *Nickerson v. Tyson*, 8 Mass. 467, *supra*, p. 216, n. 1. See, however, the remarks of Mr. Justice *Story*, in *Col. Ins. Co. v. Ashby*, 13 Pet. 331, 340. In *Marshall v. Garner*, 6 Barb. 394, a claim was made for contribution for masts, which had been cut away. At the time they were sacrificed, the ship was on a beach in four feet of water, while she drew fifteen. She was on her broadside, where she lay on her bilge. If the masts had not been cut away, the ship and cargo would have been lost, and all on board would have perished. As soon as the masts were cut away, the vessel righted, and the cargo was saved. It was held, that there could be no contribution, because, at the time the masts were cut, their destruction, from already existing causes, was only anticipated, and that nothing, therefore,

was sacrificed. This question was discussed at great length in the recent case of *Lee v. Grinnell*, 5 Duer, 400, *supra*, p. 212, n. 4. The rigging and upper spars of the vessel, which was lying at a wharf, were on fire. The firemen refused to work on board or near the ship for fear of the blocks, and other articles, which were on fire aloft, falling on them. For the purpose of saving the ship and cargo, the masts were cut away. Assuming that the purpose was accomplished, the court were divided on the question whether the masts were to be contributed for, Mr. Justice *Duer* holding that they were not, Mr. Justice *Hoffman* being of a contrary opinion, and Mr. Justice *Campbell* declining to express his views upon the subject.

But where a cargo is on fire from an accidental cause, and the vessel is scuttled, or water is poured down to extinguish the fire, and goods are thereby injured which the fire had not reached, they are to be contributed for. *Nelson v. Belmont*, 5 Duer, 310, 323; *Lee v. Grinnell*, 5 Duer, 400. See also *Slater v. Hayward*, 26 Conn. 128, *supra*, p. 212, n. 1.

SECTION XII. — *The Claim on the Insurers.*

THERE remains to be considered one important question, which has been much agitated.

Insurers pay to the insured what they, as owners of the property insured, pay by way of contribution for the safety of their goods. So, if the goods insured are lost in such a way that the insured who owned them is entitled to a contribution, the benefit of this contribution belongs in some manner to the insurers. Then the question arises whether the insured may claim his whole loss, transferring to the insurers his claim for contribution, or whether he must first recover his contribution, and, deducting that from the loss, call on his insurers only for the balance. These two ways might in some cases be the same in their result, the only difference being as to the party who should claim contribution. In practice, however, the difference between them is often extremely important.

The real question is, At whose risk is this claim for contribution? If the insured may recover his whole loss from the insurer, leaving the insurer to recover the contribution due if he can and as he can, the risk is plainly on the insurer. Suppose the contributory party is insolvent, and the goods have been surrendered without the contribution being paid or secured; the insurer paying for this loss will certainly have not only the claim of the insured for contribution, but any remedies which he possessed, either to enforce the claim or be indemnified for it; as by an action against the ship-owner for the wrong-doing of the master in not securing the claim. All this would, however, be at the risk of the insurer. If, however, the insured is bound to collect the claim in the first place, and demand of the insurer only the balance, the risk will rest on the insured.

It might be said, however, in that case, that as he has lost the property insured, the direct amount of the loss is the primary measure of the liability of the insurer; and that the insured is bound to deduct from this not what he would have a right to get by way of contribution if he could, but what he actually succeeds in recovering. This view would still throw the risk of the loss of the claim to contribution upon the insurer. The decided

weight of authority favors this; in other words, it tends to establish the rule, that the insured may claim of the insurers the whole amount of his loss, transferring to them his claim for contribution.¹

¹ In *Maggrath v. Church*, 1 Caines, 196, 215, which was an action upon a policy of insurance on the cargo, a part of which, consisting of corn, had been damaged by a peril of the sea, one of the questions submitted to the court was, whether the totality of the contribution due to the plaintiffs for the loss of their corn was recoverable in the first instance from the insurer. In answering this question, *Kent, J.*, said: "We are of opinion that it is because the loss arises wholly from a peril within the policy, and the plaintiff has a right to look for his indemnity from the person who has engaged to indemnify him from the peril. This argument appears conclusive. This will not lead to a multiplicity of suits any more than a different rule; for, if the plaintiffs could recover only a *contributory share* from the defendant, they would be compelled to resort to the owner of the ship for the residue; and this suit over may as well be brought by the insurer as the plaintiffs, for one great object of insurance is promptly to reinvest the assured with his capital lost by the perils of the sea, and thereby enable him to continue his commercial enterprises." In *Faulkner v. Augusta Ins. Co.*, 2 McMullan, 158, this question was the only one at issue, and underwent a thorough discussion. The court said: "This case presents but one question of law, — Were the insured obliged to wait for the adjustment of the average loss, or to demand the contribution of the other shippers, or in any way to pursue the contributors, before demanding the total loss of their own shipment

against the insurers? No doubt is entertained that such loss is embraced by the policy. The question is upon the condition and time of demanding it. And as little question is made that either the insured or insurers may recover of the other shippers their respective contributions, according to the adjustment made and average bonds taken in this case. But each of the present parties would avoid that alternative, and put it upon the opposite side. Which has the legal right to choose? . . . Until abandonment, in all cases, the goods saved remain the property of the insured, and he is of course bound in justice to do what he can to diminish the ultimate loss of the underwriters, — the true and unavoidable loss being all he is entitled to. But when the loss has occurred within the policy, it becomes the loss of the underwriters, and the right to recover vests in the insured. Both the right and liability are in virtue of the policy, which is a contract of indemnity; and they both follow at the moment of the loss. Can, then, this right or liability be suspended by the obligation to do what may be done for the insurers in a matter which may be done as well by themselves? The average bond is taken in order to divide the loss. To decide whose is the loss decides which party is obliged to pursue the contributors for his own interest and necessity. It is true that the insured may do so; but it does not follow that he has his immediate right to indemnity from the insurers suspended unless he does so. Like all men who have two

This rule has been held applicable, even if it would give to the insured the power of making his loss partial or total, at his

remedies, he may take either, at his own discretion, or even pursue both, until indemnified by one or the other.

. . . . Looking at the strict, legal right of the insured, and to the unquestionable liability of the insurers upon the policy, as a contract of indemnification to the former, the court does not perceive how the insured can be suspended in their right of action by the mere qualified obligation first to demand contribution of the other shippers. This is often done from self-interest, or justice to the insurers. But in many instances the obligation to do so might be inconvenient, perplex with suits, and impede the very object aimed at by the policy of insurance, — immediate reimbursement of the insured, in the value of the goods lost, in order that the voyage might not be retarded or its fruits lost, which would be contrary to the general ends of insurance, to extend commerce and advance its success. And these are to be answered by the immediate reimbursement promised by the insurers. I would think, therefore, that the adjustment of average loss among the different shippers, and the average bond, are to be considered as a counter-indemnity to the insurers, after paying the whole loss; and that this view of their office gives the foundation of the true rule, that the insured are not obliged to demand payment of the contributors before suing the insurers." See also, to the same effect, *Watson v. Mar. Ins. Co.*, 7 Johns. 57, 62; *Amory v. Jones*, 6 Mass. 318; *Hanse v. N. O. M. & F. Ins. Co.*, 10 La. 1; *Forbes v. Manufacturers' Ins. Co.*, 1 Gray, 371, 374; *Lord v. Neptune Ins. Co.*, 10 Gray, 109, 126, and dicta by Mr. J. Story,

in *Potter v. Providence Wash. Ins. Co.*, 4 Mason, 298, and by *Shaw, C. J.*, in *Greely v. Tremont Ins. Co.*, 9 Cush. 415, 419. But, on the contrary, see *Lapsley v. U. S. Ins. Co.*, 4 Binn. 502. Here there was an insurance on goods at and from London to New York. In the course of the voyage, the ship being in distress, part of the plaintiffs' goods, to the amount of more than one half, were thrown overboard, for the preservation of the remainder of the cargo and of the lives of the crew. Of the residue of the plaintiffs' goods, part was found to be in a good condition on the arrival of the ship at New York, and part damaged, but not to the amount of five per cent, in which case, by the terms of the policy, the underwriters were not to be liable. On the adjustment of the general average, the loss was about thirty-six and a half per cent. The plaintiffs abandoned, and claimed for a total loss; and the question was, whether they were entitled to recover for a total loss. It was contended, in behalf of the plaintiffs, that, as the loss happened by one of the perils insured against, they had a right to look immediately to the defendants; who, after having paid the whole loss, might place themselves in their situation, and recover the contribution to which they were entitled. Upon this argument *Tilghman, C. J.*, made the following comments: "I am not satisfied with this course of proceeding, which seems rather to invert the natural order of things. The defendants are undoubtedly answerable for the loss occasioned by the jettison, and it is equally clear that the plaintiffs have a right to receive contribution from the other persons whose property was saved.

pleasure. By an American rule, as we see more fully elsewhere, a loss of more than one half may be made a constructive total loss by abandonment.¹ Now if an insured loses by jettison of

If the value of the plaintiffs' goods is one hundred dollars, and they receive seventy dollars by way of contribution, the loss is only thirty dollars. It seems reasonable that he who is entitled to receive the contribution should in the first instance apply for it. If it should be lost without any fault of his, the underwriter is answerable. It does not appear that the plaintiffs ever applied to the persons bound to contribute, or that there was the least difficulty in procuring payment from them. One cannot help asking, then, why the plaintiffs should so pertinaciously insist on resorting to the defendants in the first instance. If indemnification for their loss is the object, what is the difference whether they receive it from the defendants or other persons? I can find no satisfactory answer to this question, but by supposing that bare indemnification will not satisfy the plaintiffs. Their object must be to make gain by abandoning to the defendants, and thus producing a constructive total loss, whereby the defendants will be involved in the state of the market at New York. I am not disposed to assist them in this attempt, unless it can be clearly shown that they have the law in their favor. . . . It is unnecessary to decide what steps are to be taken by the assured to recover the contribution before the underwriters shall be liable for the whole loss, or whether, on refusal to pay the contribution, the demand against the underwriters is to be suspended until the end of the suits brought for the recovery of it. It is sufficient, for the present, to say, that there should be a demand made from the persons bound to contribute, and some reason-

able endeavor to procure payment, and that the insured has not a right in the first instance to make an election whereby a loss partial in its nature is by construction rendered total." See also dissenting opinion of *Wardlaw, J.*, in *Faulkner v. Augusta Ins. Co.*, 2 McMullan, 161.

The rule that the insured may recover, in the first instance, of the insurers on the vessel the whole general average, does not apply to the case where the ship, freight, and cargo belong to the same person, and the freight and cargo are not insured, since they would, by the very act of recovery, and immediately upon receipt of the money, become answerable over to the defendants for that proportion of the average which ought to be borne by the cargo and freight. *Jumel v. Mar. Ins. Co.*, 7 Johns. 412, 425.

No indemnity can be given to the plaintiff in an action on a policy of insurance on a steamer, for a general-average loss, without evidence of the value of the cargo and freight. *Billow v. West. M. & F. Ins. Co.*, 1 La. Ann. 57.

¹ *Dupuy v. United Ins. Co.*, 3 Johns. Ca. 182; *Depeyster v. Col. Ins. Co.*, 2 Caines, 85; *Wood v. Lincoln & Kennebec Ins. Co.*, 6 Mass. 479; *Dickey v. N. Y. Ins. Co.*, 4 Cow. 222, S. C. 3 Wend. 658; *Saurez v. Sun Mut. Ins. Co.*, 2 Sandf. 482; *Allen v. Com. Ins. Co.*, 1 Gray, 154.

When a moiety of any portion, specifically underwritten, has been lost, its owner may abandon, however small its proportion may be to the whole lading. *Vandenheuevel v. United Ins. Co.*, 1 Johns. 406, 411.

his goods sixty per cent, and is entitled to receive half of this by way of contribution in general average, and the circumstances are such that he can receive this if he will, the rule above mentioned would give him the right to choose between recovering his contribution and claiming a partial loss of thirty per cent, and transferring this claim to the insurers, and, abandoning his salvage of forty per cent, demanding of them as for a total loss. It would be his interest to pursue the first course if the forty per cent of his goods which arrived safely found a high market and made a great profit. It would be for his advantage to take the other course if the goods arrived at a bad market and made little or no profit. The rule, therefore, would in fact subject the insurers to the risk of a market, in so far as it would make them liable for a total loss if the market were bad, and throw on him the loss of profit on the salvaged goods; while, if the market were a good one, the insurers would pay for a partial loss, and the insured take all the profits. Some objection has been made to this rule from its apparent inequality in such a case. The cases cited in our note, however, show that this rule may perhaps be considered as now an established part of the law of marine insurance, with all the consequences that may result from it.¹

¹ As to the right of the insured, in cases of constructive total loss, to claim and adjust it as a partial loss, or abandon and claim for a total loss, at his option, see *Smith v. Manufacturers' Ins. Co.*, 7 Met. 448, 451; *Hamilton v. Mendes*, 2 Burr. 1198, 1211; *Gracie v. N. Y. Ins. Co.*, 8 Johns. 237, 244. In *Earl v. Shaw*, 1 Johns. Ca. 313, 317, *Lewis, J.*, said: "The right to abandon is for the benefit of the insured, and he has an election to exercise his right or not. If he pursues the enterprise, and does not abandon, he may recover for a total or partial loss, according to the final event. If the loss should continue total, he may abandon, or, if it be converted into a partial loss, he must recover accordingly. This is favorable to the interests of trade, and is consistent with the contract and the rights of the parties. While the insured acts with good faith in endeavoring to recover the property, no injury can arise to the insurer. If he is guilty of fraud or culpable neglect, his conduct ought not to affect the insurer, and the loss in consequence is his own. There is no fixed time at which the abandonment is to be made." See also *Roget v. Thurston*, 2 Johns. Ca. 248; *Allwood v. Henckell, Park*, Ins. 239.

CHAPTER VI.

ADJUSTMENT OF GENERAL AVERAGE.

THE process of determining what amount shall be paid by way of contribution, of assessing this upon the interests which are required to contribute, and of apportioning it among the interests which receive contribution, is called the adjustment of average losses.

The principles involved in this subject are, to a large extent, equally involved in the previously considered topic of general average. But the subject of the adjustment of losses may usefully be considered by itself. We say, of losses; for it is very seldom that a ship reaches a port, under circumstances which call for an adjustment of average, without the question arising, as to some of the losses, whether they are general-average losses, to be divided accordingly, or partial losses, to be cast upon one owner alone.

This subject of adjustment may be considered under the following heads: What losses are adjusted as general-average losses. What things contribute. How the value of the receiving interests and of the contributory interests is estimated. When and where and by whom the adjustment should be made. The force and effect of the adjustment.

SECTION I. — *What Losses are adjusted as General-Average Losses.*

OF the maritime interests, ship, cargo, freight, and profits, we have seen that any one may be sacrificed to save the rest, and any one may be saved by the sacrifice of some other. Any one of them may therefore be entitled to receive contribution, or may be called upon to make contribution. There are some principles of general-average contribution which may be applied to every kind of loss. One of them requires that all of those who are interested in the property, to save which other property was sacrificed, shall suffer by the loss, respectively, only in proportion to the extent of their several interests.

The property which was sacrificed for the general benefit is, when the adjustment is made, considered as if it still constituted a part of the whole property upon which the contribution is assessed, and its value is fixed in accordance with the value of the property saved.¹ We have seen, that, if it were not so, the owner of the property sacrificed would receive its whole value, and would not then be in the same condition in which he would have been had his property been saved by the sacrifice of the property of some other party. And it is the fundamental law of general average, that all interested should suffer equally. Hence, where a sacrifice of property has been made to save the rest and nothing is saved, there is nothing to contribute, and nothing to be contributed for.²

It is important here to distinguish between sacrifices which are properly, as well as formally, general-average losses, and, on the other hand, expenses incurred for a common benefit, and reimbursed by an apportionment after the manner of general average. We say this distinction is important, although in some cases it may be difficult to apply it. But the rule or principle must certainly be this: wherever the loss is properly one of general average, nothing contributes for it that is not saved; but expenses may be incurred, on justifiable grounds, in such a way as to create a personal debt from all those for whose benefit they were incurred. This debt must be paid with no reference to the result of these expenses, and, in apportioning it among the various parties for whom it is incurred, the principles of general average will usually be applicable.³

Among the cases which have arisen in which this distinction becomes important, and at the same time very difficult, is that which occurs when goods are sold by the master in a foreign port to raise necessary funds; and the question is, whether these expenses are to be treated as sacrifices constituting general-average loss. Where these expenses accomplish their purpose,—as, for example, if money be raised for repairs, and the vessel, being

¹ 3 Kent, Com. 242; Benecké, Pr. of Indem. 286.

² Benecké, Pr. of Indem. 251; Spafford v. Dodge, 14 Mass. 66; 2 Arnould,

³ 2 Arnould, Ins. 926; Emerigon, ch. 12, § 41, vol. 1, p. 601 (ed. 1827); Benecké, Pr. of Indem. 289.

repaired, goes on her way carrying her cargo to its destination, or where money is raised by way of ransom to procure the recovery of a captured ship, and the ship is delivered up and completes her voyage,—these expenses are always regarded and adjusted as general average.¹

But suppose these expenses to be entirely ineffectual, and the whole adventure perishes; the question then arises, Are they to be repaid? Neither in England nor in this country can the law on this subject be regarded as settled.

On the Continent of Europe it would seem to be at least the prevailing rule that the ship-owner shall reimburse the owner of the goods sold, whether any part of the adventure be finally saved or not.² And the reason for this is, that it is the duty of the master and owners of the ship under such circumstances so to raise and expend their funds, and that, when they so used the goods of the shipper as to enable them to discharge this duty, they contracted an individual debt in favor of the shipper;³ and there is one English case in which this rule seems to be adopted.⁴

¹ *Plummer v. Wildman*, 3 M. & S. 482; *Brooks v. Oriental Ins. Co.*, 7 Pick. 259; *Spafford v. Dodge*, 14 Mass. 66; *Douglas v. Moody*, 9 Mass. 548; 1 Magens, 64; *Welles v. Gray*, 10 Mass. 42.

² 2 Arnould, 924; *Pothier, Contrats Maritimes*, Nos. 43, 72; *Code de Commerce*, art. 298; *Laws of Wisbuy*, art. 68. Although this last-named article is cited by Emerigon and by Valin, its genuineness is doubted by Benecké, who says that this regulation is not found in all the editions of those laws, and that the fortieth article, on the contrary, provides that the master who, in cases of necessity, sells goods abroad, shall pay for the same upon his arrival at the place of discharge, at the market price, and receive his freight in full. Benecké, *Pr. of Indem.* 266.

³ "Il a paru équitable de penser, que le capitaine et les propriétaires du navire, qui étaient chargés de pourvoir

à ses besoins, avaient contracté une dette individuelle, en appliquant ces marchandises à l'accomplissement de leur devoir personnel." *Boulay-Paty, Cours de Droit Com. Mar.* tit. 8, § 9, vol. 2, p. 420 (ed. 1821).

⁴ *Powell v. Gudgeon*, 5 M. & S. 431. In this case a ship, being disabled by the perils of the sea from pursuing her voyage, was obliged to put into port to repair; and, in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses. The action was brought by the owner of the goods sold upon a policy of insurance upon the same; and it was held that the underwriter was not answerable for the loss, it not being occasioned by a peril of the sea. *Mr. Justice Bailey*, after expressing his concurrence with the opinion of Lord *Ellenborough*, C. J., said: "It does not

On the other hand, it is held by some authorities, that goods sold abroad for a common necessity should be regarded as sacrificed for the common benefit, or, in other words, should be treated as if jettisoned; for it is the same thing to the merchant whether the goods be sold, taken, or thrown into the sea.¹ And then again, as goods if jettisoned are considered as still continuing on board, and the goods sold are to be treated as if jettisoned, they also must be considered as still continuing on board;² and therefore, if the whole adventure subsequently perishes, these goods perish with the rest, and no contribution is due for them. Emerigon, Stevens, Benecké, and Kent may be cited as holding these views.³

Mr. Arnould considers that these conflicting authorities do not differ so widely as they appear to, and that they may be reconciled to each other, by considering that the rule that the ship-owner is liable for goods so sold, although his ship be not saved by them, is applied only to the cost of the necessary repairs

appear to me that this was a loss by a peril of the sea, or such as entitles the assured to recover, under the general words of the policy; *but a loss for which the owners of the goods will be entitled to be reimbursed by the owner of the ship.* The owner of the ship undertakes to have the ship fit to perform her voyage; and, in case of accident, it is the duty of the owner, and the master in place of the owner, to provide for its repair. I consider it as a rule applicable to the construction of policies, that the court must look to the immediate cause of loss, in order to ascertain whether it be a loss within the policy. The loss here was occasioned by the act of the captain, who disposed of the goods in order to provide himself with funds for the repair of the ship. If he could have raised these funds in any other way, he would not have taken the goods. To hold this a loss for which the underwriter is responsible would be to make his liability depend upon the accident

of the captain's being unable to provide funds for the repair, except by means of the goods. In the case of jettison, the immediate cause of loss is a peril of the sea. When the whole is likely to be swallowed up by the sea, the law of jettison allows a part to be sacrificed to save the rest. Inasmuch, therefore, as we are bound, according to the common rule for the construction of policies, to look to the immediate cause of loss, and as this loss was not immediately caused by a peril of the sea, but by the inability of the captain to procure a fund for the repairs which he was bound to do, it seems to me that this was not a loss within the policy."

¹ Stevens on Av. (5th ed.) 15.

² Les effets jetés, vendus, ou donnés pour le salut commun, sont présumés être encore existans dans le navire." Emerigon, tome 1, ch. 12, § 43, p. 654.

³ Emerigon, *supra*; Stevens, *supra*; Benecké, Pr. of Indem. 292; 3 Kent, Com. 242.

which he was himself bound to make at his own expense; while the authorities who consider him discharged by the loss of the ship have in their mind only those extraordinary expenses which are incurred for the common benefit, and give a claim to general-average contribution.¹

We cannot think that very much is gained by this distinction; in fact, it leaves the question substantially unanswered; for the precise difficulty in determining such a case is to decide whether the expenses were such as the master was bound to make at his own charge, for the benefit of others, or whether they were expenses which he voluntarily incurred for a common benefit, and on which, therefore, he may found a claim for general-average contribution. But, upon the whole, we can only say that the conclusion of the authorities above referred to, who consider the ship discharged by the loss of the adventure, would be that adopted generally, to say the least, in practice, in this country.

There is another question which stands in some relation to that we have just considered, in regard to which there is much conflict of opinion, and perhaps some uncertainty. It is this: If a sacrifice be made for the common benefit and to avert the peril that threatens all, and the ship perishes by that very peril, while the cargo or a part of it is saved from the wreck, does that which is saved contribute for that which is sacrificed? The civil law declares that no contribution should be made in such a case, but that the merchants save all they can on their own account, as if from a fire.² The French law follows the rule of the civil law, and provides, that, "if the jettison does not save the ship, no contribution takes place."³ And all the French writers upon insurance are unanimous in the same view,⁴ and the same thing is asserted by English text-writers,⁵ and by

¹ 2 Arnould, Ins. 925.

² Dig. l. 14, tit. 2, f. 7. "Cum depressa navis aut dejecta esset, quod quisque ex ea suum servasset, sibi servare respondit, tanquam ex incendio."

Pardessus, Coll. de Lois Mar. vol. 1, ch. 3, p. 108.

³ Code de Commerce, art. 423; Ord. de la Marine, tit. du Jet. art. 15.

⁴ Emerigon, vol. 1, ch. 12, § 41, p.

616; Boulay-Paty, Traité des Ass. ch. 12, § 41, p. 601; Pothier, Cont. Mar. No. 114; Valin, tit. du Jet. et de la Contribution, art. 15, 19, vol. 2, pp. 205, 209.

⁵ 2 Magens, 97; Stevens on Av. 8 (5th ed.); Marshall on Ins. Bk. 1, ch. 13, § 7, p. 463. Marshall says that if, on the contrary, the ship is preserved by the jettison, and continues her course,

Chancellor Kent,¹ who cites in favor of this view two American cases.² On the other hand, Benecké³ is of a different opinion; and Mr. Phillips⁴ adds his authority to the conclusion of Benecké.

The question, while seemingly one of law, may be regarded as, to some extent, rather one of fact, — Was any property saved by the jettison? The strong expression above quoted from the French Code de Commerce goes on the supposition that the jettison was made to prevent the wreck, and, if the wreck then took place, the jettison was wholly ineffectual; and, as it did no good, it could found no claim to contribution. And it must be admitted that the most general foundation of an average claim is the prin-

but is afterwards lost, the effects saved from this last misfortune, if any, shall contribute to the loss sustained by the jettison, because to that the preservation was once owing. Magens speaks to the same effect, vol. 2, pp. 98, 240. Valin says, however, citing Domat, fol. 187, that where the ship perishes during the same storm on account of which the jettison was made, even though it may not be till some days afterwards, yet the goods saved do not contribute for those sacrificed. Tit. du Jet. art. 16, p. 207, vol. 2. Chancellor Kent, with Marshall, says that a temporary safety is all that is requisite to entitle the owners of the property sacrificed to contribution; and he cites Vinnius, in Peckium ad legem Rhodiam, 246, 250, and Boulay-Paty, tome 4, 443. 3 Kent, Com. 240. See also Scudder v. Bradford, 14 Pick. 13, 14.

¹ 3 Kent, Com. 234.

² Crockett v. Dodge, 3 Fairfield, 190; Williams v. Suffolk Ins. Co., 3 Sumner, 500.

³ Benecké, Pr. of Indem. 179. He cites a case from Emerigon, vol. 1, p. 616, where a French vessel, in order to escape from an English privateer, threw overboard her guns, part of her apparel, and one hundred barrels of rice. She

nevertheless was taken, but six days afterwards made her escape. It was decided that no contribution could take place, as the ship was not saved by the jettison. Benecké, commenting upon the case, says: "The unreasonableness of this decision is apparent, if the case is considered according to its nature, and not according to positive laws. Every party interested would, at the moment of danger, had he been present, have willingly consented to pay for the goods which must be sacrificed to give the vessel a chance to escape, even if the attempt should fail, and the vessel with her remaining cargo be saved in some other way. The attempt to save was in itself of value to all parties, consequently all parties ought to concur in the loss. Those goods, if not thrown overboard, would have been saved like the rest out of the enemy's hands; and their owner would have been in the same situation as the rest of the parties. Consequently he ought to be placed in the same situation by a general contribution, if, after an unsuccessful attempt to save the whole by jettison, it be afterwards saved by any other means." He cites Weijtsen, § 33, to the same effect.

⁴ 2 Phillips on Ins. 98.

ciple of justice, that whoever is benefited by the voluntary sacrifice of another's property, which sacrifice was made to benefit him, ought to compensate therefor. Consequently, if no one is benefited by the sacrifice, no one should be called upon to contribute for it.

But is this the only principle of justice in the case? The Spanish law,¹ Weijtsen,² whom Mr. Arnould justly calls "an early and highly esteemed writer upon average," Mr. Benecké,³ and Mr. Phillips⁴ hold that the goods saved should contribute for those sacrificed, on the ground, that, if the goods jettisoned had not been so sacrificed, their owners might have saved or recovered them in the same way as the other owners have saved or recovered theirs.

The principle involved in this is one which was somewhat considered in the preceding chapter. It is, that if property be voluntarily sacrificed to avert a common peril, and the property for whose benefit the sacrifice is made is saved, although not by that sacrifice, and the property sacrificed might have been saved as well if not so sacrificed, then this sacrifice should still be compensated for.

The obligation does not now rest upon the success of the sacrifice, but on the motive, and on the implied contract of those whose property is saved to compensate those whose property is destroyed that theirs may be saved. If all is lost, there is no claim for compensation, because nothing in fact is sacrificed; for that which is voluntarily destroyed would have been lost with the rest. But if the rest or a part of it is saved, and that which was voluntarily destroyed might have been saved as well, the implied promise of compensation comes in. We think there are American cases which sustain this conclusion.⁵ In practice

¹ Ord. de Bilbao, cap. 20, art. 16.

² Weijtsen, *Traité des Avaries*, art. 33.

³ Benecké, *Pr. of Indem.* 178-181.

⁴ 2 Phil. on Ins. § 1318.

⁵ In *Walker v. The United States Ins. Co.*, 11 S. & R. 61, it was decided that if a vessel lying at anchor be in danger of being driven ashore in a dangerous place by a storm, and the

captain, in order to avoid the danger, cuts the cables and hoists sail for the purpose of getting out to sea, or, if that be impracticable, of going ashore elsewhere, but the vessel nevertheless goes ashore and founders, the cargo saved should contribute for the loss of the cables and anchors, as well as for any other sacrifice of the rigging or hull, which can be shown to have been made for the com-

we believe it would be helped by the presumption which seems to be nearly always made, — that when property is sacrificed to save other property, and that other property is saved, the sacrifice contributed to the safety, and must therefore be contributed for.

SECTION II. — *When the Loss of the Ship is to be adjusted as a General-Average Loss.*

It is very seldom that the whole ship is to be contributed for as sacrificed for a common benefit, and therefore a general-average loss. It occurs only in a case of voluntary stranding, and this subject has been already fully considered.

But a partial injury to the ship voluntarily caused for the common benefit frequently occurs, and then it is to be contributed for.¹ In applying this rule, we must remember that here, as elsewhere in the maritime law, the word "ship" includes whatever is on board the ship for the objects of the voyage and adventure in which she is engaged, and belongs to the owners, and is either a part of the ship, or one of her appurtenances, that is, distinctly connected with the ship and the proper use of her. The question

mon benefit. Here the purpose of the sacrifice was not accomplished, — the ship was not prevented from going ashore; and yet contribution for the loss was allowed, the court holding that it was the deliberate purpose to sacrifice the thing at all events, combined with a view to the general welfare, which was the distinguishing feature between general and particular average, thus showing that the claim to contribution depended upon the motive rather than upon the success of the sacrifice. Where a ship was accidentally stranded, and, after an unsuccessful jettison of a large quantity of sugar for the purpose of getting her off, was abandoned by the master and crew, and the ship afterwards floated and was picked up and brought into port, Mr. Justice *Story* said: "In respect to the jettison of the cargo, it is

clear that it constitutes a case of general average, to be borne by the ship, freight, and cargo, *ultimately saved*." *The Nathaniel Hooper*, 3 Sumner, 542. Here the object of the jettison was to lighten the ship that it might be got off, — an object which the sacrifice clearly failed to accomplish; and yet it was held that the property ultimately saved, though saved by other means, should contribute to this unavailing loss, the intention of the loss being the common benefit of that property. But see, to the contrary, *Scudder v. Bradford*, 14 Pick. 13.

¹ *Benecké*, Pr. of Indem. 230; *Bradhurst v. Col. Ins. Co.*, 9 Johns. 9; *Gray v. Waln*, 2 S. & R. 229; *Caze v. Reilly*, 3 Wash. C. C. 298; *Walker v. U. S. Ins. Co.*, 11 S. & R. 61; *Emerigon*, vol. 1, ch. 12, § 41, p. 620.

whether a thing sacrificed is a part of the ship is of less importance in respect to the law of general average, because, if anything belonging to the owners is sacrificed for the common benefit, it must be contributed for.

Masts, spars, guns, anchors, cables, ship's stores, when purposely lost for the common benefit, are adjusted on the same footing with jettisoned goods. A difficulty in this case sometimes arises, when it is necessary to distinguish between a voluntary sacrifice and a loss by the mere perils of navigation, or even by wear and tear; as, for example, if cables are cut away or anchors are slipped to avoid being separated from convoy, this is a general-average loss on the Continent of Europe,¹ but not in England.² This question has not arisen in this country.

Here as elsewhere property lost is adjusted as general average, when it is not intentionally destroyed or lost, but is voluntarily exposed to an extreme peril which causes its destruction.³

If sails are set in a violent tempest to draw the vessel away from a lee shore, or to escape capture when they would not be exposed to such a wind under ordinary circumstances, and are blown away by the tempest, it may not be certain whether this should be adjusted as a general-average loss.⁴ It must depend

¹ Emerigon, vol. 1, ch. 12, § 41, p. 621; Casaregis, Disc. 46, n. 9, *et seq.*

² Stevens on Average, 14 (5th ed.); Park on Ins. (8th ed.) 284.

³ Sturgess v. Cary, 2 Curt. C. C. 68; Barnard v. Adams, 10 How. 304.

⁴ Where a ship was captured by a privateer, but on account of a heavy gale and the sea running high the privateer could not take possession of her, and, in order to escape, the ship carried an unusual press of sail, in consequence of which she was much strained, opened most of her seams, and carried away the head of her mainmast, but finally succeeded in getting away, it was held that these damages were only a common sea risk, and were not a subject for general average. Covington v. Roberts, 2 Bos. & Pull. N. R. 378. The court said: "This is only a common sea risk. If

the weather had been better, or the ship stronger, nothing might have happened. See also a dictum by Gibbs, C. J., in Taylor v. Curtis, 4 Campb. 338. Where similar damages were incurred by a ship's being obliged to carry a press of sail to avoid the dangers of a lee shore, the same decision was made, the court remarking, after commenting upon the Continental law upon the subject, that "with us, all casual and inevitable damage and loss, as distinguished from that which is *purposely incurred*, is a subject of particular, not general average. Shiff v. La. State Ins. Co., 6 Mart. (La.) N. S. 629. See also Power v. Whitmore, 4 M. & S. 141. But upon the Continent of Europe the law seems to be established that such an injury would give the ship-owner a claim for contribution. Valin, Ord. de la Mar.

upon the circumstances of the case. It is quite a different question from that which occurs when cables are cut, or anchors abandoned, for the purpose of putting to sea to escape from a lee shore in a storm. Here it seems to be agreed that this is a general-average loss.¹

But cables are not intended to be cut, nor anchors abandoned; whereas it is intended that sails should be exposed to the wind. Still we believe that, in practice, their loss would be adjusted as a general-average loss, if they were lost because exposed to an extraordinary peril and from an extraordinary necessity.

So we should say that the loss of an anchor, by the chafing of the cable or the impossibility of weighing the anchor, should be so adjusted when the anchor was dropped in an unusual place to escape some extreme peril.² Mr. Arnould admits that in practice this is frequently adjusted as a general-average loss, but adds that, "on principle, as the damage thus incurred was not intended or anticipated as the result of the act, as it was directly caused, not by the agency and will of man, but by the force of the elements, it ought not to be considered a general-average loss."³ But it is well settled, as we have already seen, that if goods are put into boats to lighten a wrecked vessel, and are lost by the violence of the winds and waves, on their way to the shore, this is a general-average loss, although it was not intended or anticipated as a result of the act, and was directly caused, not by the agency and will of man, but by the force of the elements.⁴

Tit. du Jet. art. 1, p. 189; Boulay-Paty, Coms. de Droit Com. Mar. tit. 12, § 2, p. 446; Prussian Ord. § 1824; Emerigon, ch. 12, § 41, p. 622. Emerigon says, "Le dommage arrivé aux voiles forcées pour le salut commun, étoient avaries grosses; car, forcer les mats, ou les voiles, c'est la même chose." Benecké says, however, Pr. of Indem. p. 190, that he has seen several French statements of general average of a later date than the Code de Commerce, in which the damage sustained by crowding sail was not admitted as a subject for contribution. The damage which the goods sustain, in consequence of a

vessel's crowding sail, is nowhere allowed in general average; nor could any good reason be assigned for making such allowance. Benecké, Pr. of Indem. 190.

¹ Greely v. Tremont Ins. Co.; 9 Cush. 419; Hennen v. Monro, 16 Mart. (La.) 449; Magens, case 27, pp. 323, 330; 2 Valin, Ord. de la Mar. tit. des Avaries, art. 6, p. 165; 1 Emerigon, 621; Bradhurst v. Col. Ins. Co., 9 Johns. 9.

² Benecké, p. 191; Weskett, tit. Gen. Av. n. 3; Weijtsen, § 11; Magens, 53.

³ 2 Arnould on Ins. 894.

⁴ Lewis v. Williams, 1 Hall, 430, 437; Code de Com. l. 2, tit. 11, n. 238; 2

It is hardly necessary to say, that where spars or sails are carried overboard by the wind, or cables cut, or anchors lost, in the common course of navigation, it is adjusted as a partial loss, and not as one of general average.¹ Mr. Arnould states this, and adds that if these losses occur "in order to prevent her drifting on a lee shore, or to avoid capture, it is general average, the reason being that in the last case there is, and in the first there is not, an immediately impending danger to justify the sacrifice."² But the presence of the danger is not enough, we think, to found the distinction; there must be not only an immediately impending danger, but a danger sufficiently extraordinary to take the case out of the common course and perils of navigation.

It is quite well settled that if any part of the ship or her appurtenances be applied for the common benefit, from necessity, to some temporary purpose, entirely different from its ordinary use, this application being such as prevents the thing so used from being restored to its ordinary use, or injures it materially, this is a general-average loss.³ It is on this principle that it has been

Valin, *Ord. de la Mar.* tit. 8, art. 19, p. 209; 1 *Emerigon*, 613; *Stevens on Av.* p. 15; *Benecké*, 209; *Abbott on Shipping*, 477. Upon the same principle, goods taken out of a ship and placed upon the beach, to lighten her when stranded, if damaged, are a subject for general average. *Hennen v. Monro*, 4 *Mart. N. S.* 449.

¹ *Dig.* 14, 2, 2; *Moses v. Sun Mut. Ins. Co.*, 1 *Duer*, 159, 170. When sails are let go for the purpose of righting the vessel, when on her beam ends, they are subjects of general average. So at least says *Benecké*, 185. But it would not be easy to distinguish this from the ordinary duties and perils of navigation.

² 2 *Arnould on Ins.* 895.

³ *Birkley v. Presgrave*, 1 *East*, 220. In this case, the ship *Argo*, as she was entering *Sunderland Harbor*, was by a sudden squall prevented from proceeding farther, and the small bower anchor was dropped in order to bring her up.

In order that the anchor might hold, and for the preservation of the ship and cargo, more cable was borne away, and the ship was permitted to drift alongside the pier, to which she was made fast with hawser ends and towing lines, such as were usually employed for that purpose. The master cut the cable from the best bower anchor that was then upon the ship's bow, fearing that another ship would be adrift and come down upon the *Argo*, and that in that case there would not be time enough to undo the cable; and with this he fastened the ship to the pier. While they were so fastening her, the hawser and towing lines, from the force of the storm and by another ship's driving against the *Argo*, broke; and if there had been another minute's delay in cutting the cable, the ship would have gone adrift and sunk upon the bar at the entrance of the harbor; and this she avoided by the cutting and using of the cable in the

decided in England that the damage done to a ship by fighting, the ship being armed for that purpose, was not to be adjusted as a general-average loss.¹ Mr. Arnould, in speaking of this case,

manner aforesaid. In an action brought by the ship-owners for contribution, they admitted that the loss of the hawser ends and towing lines did not fall within the meaning of general average, being only applied to the ordinary purposes for which they were provided; but they claimed that the cable, being appropriated to a different use from that for which it was originally intended, and for the preservation of ship and cargo, constituted a charge of general average; and the court so held, Lord *Kenyon*, C. J., saying that, "with respect to the other question, all ordinary losses and damage sustained by the ship happening immediately from the storm or perils of the sea must be borne by the ship-owners; but all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably by the defendant as general average." A similar decision was made in *Marshall v. Dutrey*, *Select Cases of Evidence*, 58.

¹ *Taylor v. Curtis*, 4 Campb. 337; 6 Taunt. 608. The plaintiffs were owners of the ship *Hibernia*, in which the defendants shipped goods to be carried from London to St. Thomas, in the West Indies. In the course of the voyage the ship was attacked by an American privateer. The *Hibernia* resisted, and a severe engagement ensued. The privateer was beaten off, and the *Hibernia* delivered her cargo safely to the consignees. She sustained great damage, during the engagement, in her hull and rigging, which were repaired

at a considerable expense to the owners. They also incurred a further expense in providing medical assistance for several of the crew who were wounded in the action. Large quantities of gunpowder and shot were likewise expended upon the occasion, which had formed part of the stores and outfit of the ship. In the trial at *nisi prius*, *Gibbs*, C. J., said: "I cannot feel that this is a loss entitling the plaintiffs to claim a contribution as for general average. The defence may be ungracious; but according to the rules which prevail in this country I think the loss must fall entirely upon the ship. I cannot distinguish this from the case of a ship carrying a press of sail to escape from an enemy. That is done voluntarily for the preservation of all; but it has been held that a loss arising from a hazard so incurred is not the subject of general average. I likewise remember a case where a ship ran away from a privateer, and was shot through, and it was held that the owner could not claim a general average from the damage so sustained. The practice of underwriters sometimes to contribute to a loss such as this cannot weigh much, as it may be accounted for from the honor and liberality of those who contribute, and from the sense they must feel of their own interest. If there is no reward allowed for a gallant resistance, such resistances will not be made, and the whole value of the property must be paid, instead of a gratuity for saving it."

This decision was confirmed upon appeal by the Court of Common Pleas. The court there said: "The measure

thinks that the rule should be confined to a ship of war ; and fighting ought not, in his judgment, to be regarded as falling within the scope of those ordinary duties of navigation to which the owner is bound by his contract with the freighter.¹ To this we should reply, that the ship was armed for this very purpose, and that the shipper put his goods on board of her knowing that, and perhaps because he knew that she was armed and able to defend herself, and would do so wherever possible. Mr. Stevens agrees on the whole with the conclusion of the court, but states that many well-informed underwriters think that it should be a general-average loss.² We cannot but think that the court were unquestionably right.

We agree with what Chief Justice Gibbs said in trying the case at Nisi Prius. "I cannot distinguish this from the case of a ship carrying a press of sail to escape from an enemy." It was the duty of the ship to make the utmost use of its sails to escape in that way if it could, but if it could not escape by their help, then to use its guns.

Where the ship is intentionally cut or damaged that fire may be reached and extinguished, it is obvious that it should be adjusted as a general-average loss.³

SECTION III. — *When the Cargo should be contributed for.*

By far the most common instance of this is jettison of the goods ; but, as we have already seen, goods sold in a foreign port under a necessity which justifies their sale and to raise funds for the common benefit should be adjusted, by the weight of authority and by what we believe to be prevailing practice, as a jettison of the goods.⁴

of resisting the privateer was for the general benefit, but it was a part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them ; and there, it seems to me, they ought to rest." 6 Taunt. 623.

¹ 2 Arnould on Ins. 897.

² Stevens on Average (5th ed.) 36.

³ See *Nelson v. Belmont*, 5 Duer, 310, *infra*, p. 308, n. 1. *Benecké*, Pr. of Indem. 243 ; *contra*, *Emerigon*, ch. 12, § 17, p. 436.

⁴ *The Ship Packet*, 3 Mason, 255, 260 ; 3 Kent, Com. 242 ; *The Gratitude*, 3 Rob. Adm. 263 ; *Dobson v. Wilson*, 3 Campb. 480, 487 ; *Giles v. Eagle Ins. Co.*, 2 Met. 140, 144 ; *The Mary*, 1 Sprague, 51.

If goods are injured for the common benefit, as by water used if the ship be on fire to extinguish it;¹ or if a hole be cut in the deck to get at the burning ship, and before it can be secured the waves break in and damage the cargo;² such an injury would be adjusted as an average loss. It might be a different question if the goods themselves were on fire, and water poured in to extinguish it, and the cargo was saved but in a wet and damaged condition; should the ship now contribute? The peril was a common one, for the cargo could not be permitted to burn without imperilling the ship. But the goods were in the first and immediate peril, and it was primarily to save them that they were wet. It would be an analogous question if the ship alone were on fire. We may suppose lightning had set fire to its top-mast and the mast was cut away, and with its sails and rigging lost; would the cargo now be required to contribute?

¹ In *Nimick v. Holmes*, 25 Penn. St. 366, while the steamboat of the plaintiff was lying at the wharf in Cincinnati, taking in its cargo, it was discovered to be on fire in the hold. It was at first attempted to extinguish the flames by injecting steam into the hold and pouring in water; but this proving unavailing, and the officers believing there was no other means of saving the boat and cargo, determined, after consultation, to scuttle her. They accordingly ran the boat out into the river about two miles from the wharf, and there sunk her. A portion of the deck was torn up, and water introduced from above, and by these means the fire was subdued. Subsequently the boat was raised and taken back, with the remnant of the cargo, to Cincinnati, where the cargo was sold. The cargo was injured to about seventy-five per cent of its value, and the boat and cargo together to about twenty-five per cent of their entire value. It was held that this damage was a subject for general average. The court said: "Guided by the light of the rule and its instances,

we feel constrained to say that when a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of the vessel in order to get at it, is general average. The danger is a common one, and the cost of the remedy must be common. It makes no difference how the water is applied, — by the aid of fire-engines on the land, or in the form of steam, or by scuttling the vessel. All these modes were tried in this case before the success was complete. They are all to be treated together, because they all referred to the same peril. They were the means employed for the purpose of averting the danger in which they were placed. It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water, in order to save the rest. The result was successful, if a single article was saved by the means employed."

² See *Nelson v. Belmont*, 5 Duer, 310, *infra*.

Or a still nicer question might arise if the cargo were on fire and it was owned by many shippers, and that part of it which was damaged by water was owned by other shippers than those who owned the goods actually on fire; and the goods of yet other shippers were saved unharmed. Is all the damage by water a general-average loss, and if so, who shall contribute to it? Shall it be the owners of the uninjured cargo, or the ship-owners also, or all who are interested in ship, cargo, or freight?¹ It may be difficult to draw the line, but we think there is some ground for a distinction between these cases and such a case as where the ship is cut to extinguish fire, and the cargo being saved contributes to the ship; and where a hole being cut to get at the fire, the waves get through it and damage the cargo, and the ship contributes therefore.

That the cargo may have a claim for contribution for consequential damage must be certain, and a good case to illustrate this rule may be that to which we have already previously adverted,

¹ In *Nelson v. Belmont*, 5 Duer, §10, a vessel, bound from New Orleans to Havre, was struck by lightning, and set on fire. It struck the mizzen top-gallant mast, passed down the mizzen-mast into the cabin and into the between-decks. Holes were cut in the upper deck, around the mizzen-mast, and water poured down into the between-decks, where the cargo was. This being ineffectual, the holes were stopped up to stifle the flames. The next day it was found necessary to put into a port of distress, and a Danish brig was engaged to accompany her. The passengers and eight kegs of specie, which constituted a part of the cargo, were removed to the brig. The two vessels arrived at Charleston, when the fire-engines of the city were employed. The vessel was filled with water, and after that she was pumped out, and the cargo discharged. The captain made some slight repairs to the vessel at Charleston, and then brought

her to New York, where repairs to a large amount were made. Upon the trial it was held that the damage to the vessel occasioned by cutting the holes in the deck, when at sea, to pour down the water, that is, the mere expense of repairing the deck where these holes were cut, was to be allowed as a proper item for contribution; that the damage caused to the vessel by the swelling of the cargo was also proper; that only that part of the cargo should be contributed for which could be shown to have been damaged exclusively by the water; that the freight was neither to be contributed for nor to contribute; that the cargo was to contribute in the usual manner, including the amount allowed in general average; and that the specie on board the vessel, and which was transferred to the Danish brig, was liable to contribute, in common with any other portion of the cargo, to whatever might be a proper subject of general average.

where a mast was cut away and a hole thereby opened in the deck through which water penetrated to the cargo.¹

SECTION IV.—*When a Loss of Freight is to be adjusted as a General-Average Loss.*

THE ship earns its freight only by carrying its cargo to its destination. It is obvious, therefore, that, if goods be jettisoned, it is not only the owner of the goods who loses thereby, but the owner of the ship loses the freight which he would have earned by carrying those goods. There would seem to be, therefore, no reason whatever why he should not have a claim for contribution for the freight thus lost. This is in practice adjusted as an average loss, and the authorities sustain this view.²

¹ In *Maggrath v. Church*, 1 Caines, 196, the vessel, loaded with corn, encountered severe weather, and a mast was cut away for the general preservation. In cutting it away it was splintered, and in consequence thereof water entered the hold and damaged the corn. *Kent*, J. said: "The corn being damaged by the cutting away of the mast is to be considered, equally with the mast, a sacrifice for the common benefit,—a price of safety to the rest; and it is founded on the clearest equity, that all the property and interest saved ought to contribute their due proportion to this sacrifice." In *Lee v. Grinnell*, 5 Duer, 400, 423, *Hoffman*, J., said: "The essential constituents of a case of contribution are, that the intelligence, the will, and the act of man have intended and produced the sacrifice of the thing for which compensation is sought, and have worked in whole or in part the preservation of the property from which it is claimed. The subjects destroyed must have been, in the contemplation of the party, as things to be destroyed. This rule admits, indeed, of a few guarded exceptions, but none which may not

be considered, in the ordinary course of events, as comprehended within the intention. The cutting away of masts is probably as often accompanied with damage to boats and railings as otherwise, and this may well be assumed to have been an expected consequence. The leak, as in the case of *Maggrath v. Church*, may reasonably be anticipated as a probable result of the splintering of masts when cut away." See also *Salтус v. Ocean Ins. Co.*, 14 Johns. 138; *Shelton v. Brig Mary*, 1 Sprague, 17; *Bond v. Superb*, 1 Wall., Jr., 355, *supra*, p. 232, n. 1.

² Where a ship, bound from Havana to St. Petersburg, with a cargo of sugars, struck on the south shoal of Nantucket, and was there, after a jettison of part of her cargo, abandoned by the master and crew, and the ship afterwards floated off the shoal, and was met and brought into port by salvors, and there libelled for salvage, it was held that the full freight of the sugars, of which there was a jettison, for the voyage, was to be allowed as part of the general average to be borne by the ship and cargo, and the freight (*pro rata*) saved. The Ship *Nathaniel Hooper*, 3

In adjusting an average loss on freight, the value taken when the freight is entitled to contribution is the gross freight at the port of contribution. If the freight is called on to contribute, only the net freight on the saved and carried contributes. This is usually ascertained by some rule established by usage, and this rule differs much in different places. As far as we can learn, this deduction is one half in New York, Virginia, Alabama, Georgia, Texas, and California; so it is in Havre. One third is deducted in Massachusetts, Maine, Pennsylvania, Maryland, and Louisiana. In England, from the gross freight, including primages, wages and port charges are deducted, and the remainder contributes.¹

Sumner, 542. In deciding the above case, Mr. Justice *Story* said: "In respect to the jettison of the cargo, it is clear, that it constitutes a case of general average, to be borne by the ship, freight, and cargo, ultimately saved; and of course in that contribution the entire freight of the cargo thrown overboard is to be added to the loss as a part of the sacrifice, and is to be allowed to the ship-owners. This is the settled course in the adjustment of general average."

It is a general rule that a claim for freight follows the fate of a claim for the vessel. If a vessel is lost under circumstances which make her loss a case of general average, the freight which is lost is an additional sacrifice of the owner. It has been earned in part, and would have been earned in full, but for the voluntary act which entailed the loss of the vessel, and, of course, prevented the earning of the freight from the ship-pers. *Nelson v. Belmont*, 5 Duer, 310, 322. In *Col. Ins. Co. v. Ashby*, 13 Pet. 331, 344, the court says: "The only other remaining point is, whether freight ought to have been brought into the ac-

count, either as a part of the loss or of the contributory value. The auditor's report, which was adopted by the court, allowed the freight as a part of the loss and also of the contributory value. It is perfectly clear that, if a part of the loss, the freight ought also to contribute. And it seems to us, that, as by the loss of the ship the freight was totally lost for the voyage, it was properly included in the loss, and as a sacrifice by the ship-owner for the common benefit."

If the voyage is broken up in any other way than in consequence of a voluntary sacrifice, the freight lost is not to be contributed for. *Lee v. Grinnell*, 5 Duer, 400, 431; *Nelson v. Belmont*, 5 Duer, 310, 323; *Tudor v. Macomber*, 14 Pick. 34. When freight is entitled to contribution, the value is the gross freight lost by the sacrifice. *Mutual Safety Ins. Co. v. Cargo of Ship George*, Olcott, Adm. 157. See also *Gray v. Waln*, 2 S. & R. 229; *Magens*, 272, 277, case 24; *The Ann D. Richardson*, Abbott, Adm. 499.

¹ *Dixon on Mar. Ins. & Average*, 149.

SECTION V. — *When a Loss of Profits is so adjusted.*

A LOSS on profits is never adjusted as a general-average loss, on the ground that they were expected and would have been earned had not the goods been lost. It may be said at least that they are never contributed for under the name of profits; but if goods are valued and a loss of them is adjusted at this valuation, the profits might be actually contributed for, if, as is very common, they entered into the valuation.¹

SECTION VI. — *What Expenses are adjusted as a General-Average Loss.*

WE have already seen that expenditures for a common benefit are frequently charged on the interests receiving the benefit, and then they are adjusted as a general-average loss.

By the law-merchant among all civilized nations, the master of a vessel has certain definite powers and duties, which relate mainly to the navigation of the vessel, the control of all on board, and the care of the ship and all the property it contains. These powers and duties belong to his office, and are much the same everywhere. Besides these, however, he has sometimes other powers and duties springing from necessity. We have had occasion to consider these powers from necessity in connection with other topics, and also to some extent in a previous part of this chapter. Where expenses are incurred by the exercise, on the part of the master, of one of these powers, two things are to be remembered: first, that it certainly is not among the general powers and duties of his office to sell the ship or the cargo, or to borrow money on the pledge of ship or cargo, or in any other way on the responsibility of the ship-owner or shipper; but, secondly, that he may be justified in doing any or all these things by a sufficient necessity. By such necessity he is made the agent of the ship-owner or shipper, and binds them by his acts in the same way as if he had for these acts their express authority.² Thus, in the

¹ The Nathaniel Hooper, 3 Sumner, 29. This was an action on a policy of insurance on the cargo of a ship from

542.

² Fontaine v. Col. Ins. Co., 9 Johns. Guadalupe to New York. The vessel

chapter on total loss, we see that he may sell the vessel;¹ but such a sale, although it may make a constructive total loss, will

was captured by a British cruiser and carried into Antigua, and libelled in the Admiralty Court there. The master put in a claim, and the goods were detained for further proof, but were delivered to the master on his giving security for their appraised value and paying the costs. The master procured Hall and Rose, merchants at Antigua, to become security, and also to pay the costs and other expenses for the ship and cargo; and for their indemnity he drew bills of exchange on his owner in New York, and pledged the ship and goods to Hall and Rose, to secure the amount, which included a commission of five per cent, charged by them on the sums advanced, and a premium of insurance which they paid to insure the ship and cargo so pledged, from Antigua to New York. The cargo was delivered to the agent of Hall and Rose in New York, and the insured, to obtain possession of his property, paid his proportion of the charges and expenses, including the commissions and premium of insurance, and brought this action to recover the amount so paid from their insurers. It was held that, the master having acted with good faith, and the charges being reasonable and necessary, the insured were entitled to recover this amount. The court said: "The plaintiff's cargo was mortgaged to Hall and Rose, in consideration of their becoming security to answer for its value, and there is no reason to doubt of the power of the master to mortgage it. The principles of the maritime law clothe him with the power of agent of the cargo, when cases of extremity occur. He may sell a part, or he may hypothecate the whole cargo, even for the necessary repairs of the ship, when that

act is required to enable him to continue the voyage. Though, ordinarily, he is the mere carrier of the cargo, yet in a case of difficulty and peril, he becomes *ex necessitate* a trustee of it, with a large and liberal discretion, and this character is then given to him from public policy, for without this power the cargo might be left to perish. If the master has this power over the cargo for repairs to the ship, it exists, in at least equal force, when the interest of the cargo is directly in question; and this case contains intrinsic evidence that the terms on which the assistance of Hall and Rose was procured were as favorable as any that could have been obtained. The plaintiffs had no agent or consignee at Antigua, for none appears, or is to be presumed. It was an island to which the ship was carried by the captors. To whom was the captain to apply for aid? If Hall and Rose had exacted exorbitant compensation or security, the presumption would have been different, and it might have been incumbent on the plaintiff to have shown that other applications for security had been made, and failed. The indemnity required by Hall and Rose, of a mortgage of the cargo released, was reasonable for them to ask, and within the power of the captain to give; and, having taken it, the insurance was necessary to render the security perfect, and the premium for the insurance was no more than a necessary charge attending the taking of the security."

¹ See *The Catharine*, 1 Eng. L. & Eq. 679, 681; *Am. Ins. Co. v. Ogden*, 15 Wend. 532; *Somes v. Sugrue*, 4 C. & P. 276; *Robinson v. Com. Ins. Co.*, 3 Sumner, 220.

not be adjusted as a general-average loss. So, too, he may sell the goods, if perishable,¹ or for other sufficient reason; and this may constitute an analogous loss of the goods, which would not, however, be adjusted as a general-average loss, any more than a loss by sale of the ship. We have already inferred, from the adjudication on this subject in respect to general average, that here, as so often elsewhere, it is necessary to distinguish between expenses for which the ship alone is bound, because they belonged to the duty of navigation, and those which, being incurred to relieve all the property from a common danger, which lies outside of the ordinary perils of navigation, give a right to general contribution, and are to be adjusted as a general-average loss.

But he may borrow money on the ship, or on the cargo, or may raise it by sale of the cargo or of a part, under such circumstances and for such purposes as may create a general-average claim.² Through all these cases, whether they belong to particular average or to general average, there runs one question, — was the borrowing, or the sale, justified by necessity. If so, the adjuster will cast the loss upon those interests to benefit which the money was raised. If not so justified, then he will cast it upon the party only who was in the wrong, whether he did it personally or by one for whom he was responsible.

It is difficult to determine what this necessity must be to justify this act; and in its connection with different topics, particularly total loss, and bottomry and respondentia, we have fully considered this question. Here, in its bearing on the duty of the adjuster, we will only say, that it is quite certain that, by the law-merchant, different degrees of necessity authorize and justify different classes of acts; thus it may be said that the master may make repairs and bind his owner for them, on the simple ground that such repairs were on the whole expedient or desirable; and yet even here it is plain that he would not

¹ *Jordan v. Warren Ins. Co.*, 1 Story, W. 320; *Smith v. Martin*, 6 Binn. 342; *The Gratitude*, 3 Rob. Adm. 262.

240, 259; *Hugg v. Augusta Ins. and Banking Co.*, 7 How. 595, 609; *Vaughan v. Western M. & F. Ins. Co.*, 19 La. 54; *Vlierboom v. Chapman*, 13 M. & W. 320; *The Gratitude*, 3 Rob. Adm. 240, 263; *Giles v. Eagle Ins. Co.*, 2 Met. 140, 144; *The Mary*, 1 Sprague, 51; *The Constancia*, 4 Notes of Cases, 677.

be justified in making very large and expensive repairs, except by an expediency which should amount almost, if not quite, to a necessity.¹ When he comes to borrowing money on bottomry of the ship, or by respondentia of the cargo, there must now be a stronger and an unquestionable necessity.² But if he under-

¹ In the case of *The Ship Fortitude*, 3 Sumner, 228, 237, which was a suit *in rem*, founded on a bottomry bond given by the master of the ship for moneys taken up for the repairs of the ship, the main question raised by the pleadings was upon the necessity of the repairs, the respondents contending that they were unnecessarily, if not fraudulently, made. In deciding this question, Mr. Justice Story remarked: "In relation to what are necessary repairs in the sense of the law, for which the master may lawfully bind the owner of the ship, I have not been able, after a pretty thorough search into the authorities and text-writers, ancient and modern, to find it anywhere laid down in direct or peremptory terms, that they are such repairs, and such repairs only, as are absolutely indispensable for the safety of the ship or the voyage, or that there must be an extreme necessity, an invincible distress, or a positive urgent incapacity, to justify the master in making the repairs. The general formulary of expression found to be laid down is simply that the repairs are to be necessary, without in any manner pointing out what repairs are, in the sense of the law, deemed necessary, or what constitutes the true definition of necessity. But a thorough examination of the common text-writers, ancient as well as modern, will, as I think, satisfactorily show that they have all understood the language in a very mitigated sense; and that *necessary repairs* mean such as are reasonably fit and proper for the ship under the circumstances, and not

merely such as are absolutely indispensable for the safety of the ship or the accomplishment of the voyage."

² The authority of the master is limited to objects connected with the voyage, and, if he transcends the prescribed limits, his acts become in legal contemplation mere nullities. Hence, to make a bottomry bond executed by the master a valid hypothecation of the ship, it must be shown by the creditor that the master acted within the scope of his authority; or, in other words, it must be shown that the advances were made for repairs and supplies necessary for effectuating the objects of the voyage or the safety and security of the ship; and no presumption should arise that such repairs and supplies could be procured upon any reasonable terms with the credit of the owner, independent of such hypothecation. *The Aurora*, 1 Wheat. 102.

"To justify the giving of a bottomry bond, it is not only essential that there should be a necessity for the repairs, but that there should also be a necessity of resorting to a bottomry bond in order to procure the proper funds to defray the expenditure. If the master has funds of his owner in his own possession, or if he can procure funds upon the personal credit of the owner, he is not ordinarily at liberty to resort to a bottomry loan. In short, it is only when this is the only or the least disadvantageous mode of borrowing, that the master is at liberty to resort to it as a *dernier resort*. The giving of a bottomry bond is therefore properly said

takes to sell the ship, or the cargo, or any part of it, the necessity must now be yet stronger. It must be certain and stringent. It must be a necessity which leaves to him no alternative but to proceed in this way, or let the property intrusted to his care perish or waste away, to the detriment of the owners.¹

to be justifiable only in a case of great extremity, of urgent necessity, or of extreme pressure. In cases of bottomry, the expressions may be appropriate when they would be utterly inapplicable to common cases of repairs." *Story, J.*, in *The Ship Fortitude*, 3 Sumner, 228, 234.

The master may sell a part or he may hypothecate the whole cargo, even for the necessary repairs of the ship, when the act is required to enable him to continue the voyage. *Fontaine v. Col. Ins. Co.*, 9 Johns. 29.

¹ The master of a vessel, as such, has no authority to sell the vessel or the cargo, unless in a case of extreme necessity, and where he acts with the most perfect good faith for the interest of those who are concerned in the property. *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249. There must be something more than expediency in the case; the sale should be indispensably requisite. The reasons for it should be cogent. It must be a necessity which leaves no alternative, which prescribes the law for itself, and puts the party in a positive state of compulsion to act. The master acts for the owners or insurers, because they cannot have an opportunity to act for themselves. *Hall v. Franklin Ins. Co.*, 9 Pick. 466.

In *Idle v. Royal Exch. Ass. Co.*, 3 Moore, 115, 145, *Dallas, C. J.*, says: "The right to sell, as between the captain and the owners, has been deemed of a very questionable nature; although, upon the whole, extracting from the books what seems to be the weight of

authority, I conceive that the right to sell must be considered to exist in cases of extreme necessity, — a right, however, which in all cases must be strictly watched."

As between the owner and the master, it is not sufficient that the sale be one of good faith on the part of the master, and for the benefit of all concerned, unless there be an urgent necessity. *The Schooner Tilton*, 5 Mason, 465; *Read v. Bonham*, 3 Bro. & Bing. 147.

In cases of necessity, the master may sell in a foreign country, rather than let the property perish, but not in the country where his owner lives. *Scull v. Bridle*, 2 Wash. C. C. 150.

"The master has an authority to sell only in cases of extreme necessity, not indeed of physical necessity, but of moral necessity. By moral necessity, I understand, not an overwhelming and irresistible calamity or force, but a strong and urgent, and, if one may so say, a vehement exigency, which justifies and requires the sale to be made, as a proper matter of duty to the owner, to prevent a greater sacrifice, or a total ruin of the property." *Story, J.*, in *Robinson v. Com. Ins. Co.*, 3 Sumner, 220, 227. See also *N. E. Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387; *Thorneby v. Hebson*, 2 B. & A. 518; *The Betty Cathcart*, 1 Rob. 220; *Robertson v. Clarke*, 1 Bing. 445; *Bryant v. Com. Ins. Co.*, 13 Pick. 543; *Caldwell v. W. M. & F. Ins. Co.*, 19 La. 42; *Somes v. Sugrue*, 4 C. & P. 276, *infra*.

It has been said that the necessity for these acts is sufficient to justify them, if it must be supposed that the owner if present, and a rational man, would do the same things.¹ We cannot think that this is quite true; and while we admit that there may be some difficulty in pressing the rule too far, we should say that, while the owner, if present, might reasonably choose this thing among others, the master would be justified in doing them as his agent, only when he could do only these things, and had, properly speaking, no choice.

We have considered some of these questions in other connections; and have dwelt upon them now, because, when a loss occurs through such an act of the master, while the insurers are liable for it either as particular average or as general average when such a necessity existed, in some adjudicated cases and in practice, such expenses are sometimes adjusted as a general-average

¹ In *Robinson v. Com. Ins. Co.*, *supra*, Judge Story, in defining the necessity which will justify the master in selling, says: "I know not how better to put the case of such a moral necessity than to say, that it is such an act of sale as, under like circumstances, a considerate owner, who was uninsured, would adopt for his own true interest, and that of all concerned in the voyage." Lord Mansfield, in *Milles v. Fletcher*, Doug. 234, said: "Whatever it was right for the captain to have done, if it had been his own ship and cargo, the underwriters must answer for the consequences of." In *Somes v. Sugrue*, 4 C. & P. 276, 283, the court says: "A captain has no power to sell except from necessity, considered as an impulse, acting morally to excuse his departure from the original duty cast upon him of navigating and bringing back the vessel. If he has no means of getting the repairs done in the place where the injury occurs, or if, being in a place where they might be done, he has no money in his possession, and is not able to raise any, then he is

justified in selling, as the best thing that can be done. In the present case, it appears that the vessel was in a place where the repairs could be done, and where money could be obtained, although at an extravagant expense. Still the question is, whether the expenditure was so great that no prudent man, in the exercise of a sound and vigorous judgment, would hesitate as to the propriety of selling. If you think that, if the owner himself had been on the spot, uninsured, he, in the exercise of a sound discretion, would have repaired the vessel, or that, if an agent of the underwriters had been there, he, exercising such a discretion, would have repaired, then this captain ought certainly to have done so. But, if they would not have done so, then I think this captain was not compellable to repair, and the sale in such case will have taken place under a justifiable necessity." But see *contra*, as to the power of the master to sell the cargo because a prudent owner, if present, would do so, *Bryant v. Com. Ins. Co.*, 13 Pick. 543.

loss when they rest upon no other justification than that of reasonable expediency.¹

If a master sells a cargo or a part of it for insufficient reasons, he sells it without authority. If the owner of the cargo be also the owner of the ship, it is his servant who has done him this wrong, and he has no remedy unless he may have one against the master. If the shipper be not the ship-owner, then he is injured by the master, for whom the ship-owner is responsible; and in neither case should the insurer be responsible, for he insures only against the perils of the sea, and this is not a peril of the sea.² If the wrongful act amounts to barratry, the insurers will be responsible if they insured against barratry, but a loss by barratry would not come within the scope of general average.

Text-writers generally make a distinction between those general-average claims which arise out of sacrifices and those which rest on expenditures. We are satisfied, however, that this distinction is unreal, and the three essentials of all general-average claims apply equally to sacrifices and expenditures, that is to say, they must be voluntary, necessary, and effectual.

It must be especially remembered, in claims founded on expenses, that only that part of the property for the benefit of which the expenses are incurred is liable for it.³ If for the ship only,

¹ See the strong language of Lord Mansfield, in *Milles v. Fletcher*, in the preceding note.

² An insurer on goods is not liable when the goods are sold by the captain of a ship to defray the expense of repairs rendered necessary by a tempest, to which ship and goods had been exposed. The owner of the ship ought to furnish the captain with funds for repair; if he omits to do so, and the captain is obliged to sell the cargo, he whose goods are sold may claim the value of the owner; and the owner may sue the insurer on ship for the expense incurred in repair. *Sarquy v. Hobson*, 4 Bing. 131; *Powell v. Gudgeon*, 5 M. & S. 431.

³ Where a vessel and cargo were captured, and the cargo, but not the ves-

sel, was proceeded against in the Admiralty Court, and a part condemned and the residue released, and, to prevent an appeal and avoid further detention, the master agreed to pay a specific sum, as a ransom, and sold a part of the cargo, being more than a moiety of the part insured, to defray the expenses and pay the ransom, it was held that the sum paid for ransom and expenses was not general average, having been paid solely for the benefit of the cargo, and not to obtain a liberation of the vessel, which was not brought into controversy, but must be borne as a particular average upon the cargo alone. *Vandenheuvel v. Un. Ins. Co.*, 1 Johns. 406. See also *Watson v. Mar. Ins. Co.*, 7 Johns. 57; *Jumel v. Mar. Ins. Co.*, 7 Johns. 412; *Peters v. Warren Ins. Co.*, 1 Story,

the cargo does not contribute; if for the cargo only, the ship does not contribute; and if for a part of the cargo only, it must be adjusted as a loss, partial or total, of that part only.

Wherever an act is done for the safety both of the ship and cargo, and therefore founding a claim for general-average loss, all the expenses directly and necessarily incident to that act, and connected with it, are to be adjusted as a part of the general-average claim. Thus, if the ship put into some port for repairs, under circumstances which make the expense of these repairs a general-average loss, then all the expenses in bringing the ship into port and clearing her out again, piloting,¹ towage,² charges of watch-

468, 469; *Benecké, Pr. of Indem.* 223. The principle of contribution is, that everything which is saved by common expense and labor shall pay that expense in proportion to its value; therefore property taken from the vessel by the owners, before the expense was incurred by which the vessel was saved, is not subject to contribution, as it cannot be said to have been saved by that expenditure. *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1, 10. In *Castillain v. Thompson*, 13 C. B., N. S., 105, T. & Co., the owners of flats or barges at Liverpool, were employed by H. & Co. to carry certain copper ore to one L., the owner of crushing-mills at Birkenhead, who, in consideration of being employed to crush the ore, agreed to indemnify H. & Co. against all risk in the transit. Whilst on its way to Birkenhead, the barge with the ore on board foundered in the river. The barge-owners gave notice of the loss to the shippers, and requested to be employed to raise the cargo; but were answered that they had better see L., as the shippers had nothing to do with it. But L. referred them to M., with whom he was insured for orders, and the latter said: "You had better go on with it, and do the best you can for us." T. & Co. thereupon proceeded with the work, and, after incur-

ring great labor and expense, succeeded in recovering the ore. It was contended, in behalf of T. & Co., that they were entitled to claim the expenses incurred by them as general average, since the ore was on board their vessel, sunk at the bottom of the river, and the expenses were incurred in recovering the vessel and her cargo. But it was held that this claim could not be allowed, as it was not for expenses incurred by the master or the owners for the benefit of all concerned, but for those incurred by virtue of a contract entered into with the insurer, the person ultimately interested in recovering the ore.

¹ *Benecké*, 192; 2 *Phillips*, § 1326.

² *Wightman v. Macadam*, 2 Brev. 230, 233; *Beawes*, 150. This charge was allowed in a London adjustment of an average in case of an American vessel putting into that port. 2 *Phillips*, § 1326, in notes. In *Lyon v. Alvord*, 18 Conn. 66, the vessel of the plaintiffs, on her way from Albany to Westport, with a cargo of lumber, a part of which was consigned to the defendant, was driven, by stress of weather, on a rock in Long Island Sound, and a hole was broken in her hull; in consequence of which, she filled with water, and became unable to proceed on her voyage, and was in danger of sinking. The

men,¹ of men hired to assist in pumping the ship,² cutting a way for the ship through ice,³ and all the expenses necessarily incurred for the repair of the ship, necessary loading or unloading,⁴ and all other expenses of similar character, are treated in the adjustment as a part of the general-average claim;⁵ only, however, so far as the expenses were for the common benefit.

plaintiffs thereupon procured her to be towed into the harbor of Southport, where they obtained another vessel to take the cargo to Blackrock, where it was delivered to the defendant. There was no evidence that the defendant requested any of the acts, either of towing the vessel into Southport or in procuring the cargo to be transported to Blackrock. The action was brought by the ship-owners against the owner of the lumber for contribution. It was held that the acts done by the plaintiffs, from the time the vessel became disabled until she was brought into the harbor of Southport, being found necessary, were proper subjects of a general average, and the plaintiff was accordingly entitled to recover; that if the exception had been properly taken, the defendant would not have been liable for the expense of taking the lumber from Southport to Blackrock; unless this was part of the process of lightening the vessel or of fitting it for repairs, in order to save it and the cargo, and to complete the voyage; in which case this expense also would be the subject of a general average; and that as the objection of the defendant, on the trial, went to the whole claim of the plaintiffs and the whole evidence to support it, without discrimination, and no distinct question as to the last-mentioned expense was made, a judgment covering the entire expense would not, for that reason, be reversed.

¹ Stevens on Average (5th ed.) 23.

² Orrok v. Com. Ins. Co., 21 Pick. 469, 470.

³ 1 Magens, 67.

⁴ The Copenhagen, 1 Rob. Adm. 289, 294; Plummer v. Wildman, 3 M. & S. 482, 487; Barker v. Phoenix Ins. Co., 8 Johns. 307, 318; Da Costa v. Newnham, 2 T. R. 407.

In Hall v. Janson, 4 El. & B. 500, 507, where a ship, being damaged by stormy weather, was forced to go out of her course to be repaired, and for this purpose the cargo was necessarily unloaded and loaded again, the court said: "The expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship, that she may be made capable of proceeding on her voyage, have been held to give a claim for general-average contribution; for the acts which occasion these expenses become necessary from perils insured against; and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight."

⁵ Where a survey is properly made at a foreign port, in order to ascertain the amount of damage and the propriety of making repairs, if the damage is a peril insured against, the expense is to be contributed for. Potter v. Ocean Ins. Co., 3 Sumner, 27.

Whatever charges are necessarily incurred where a vessel is compelled to seek refuge from a tempest, in a port out of the course or short of her port of destination, for the mutual safety of the ship and cargo, the owners of each are respectively bound to contribute in proportion to their several interests.

Thus, for example, if the ship could have been as well repaired with the cargo on board, and the cargo only unloaded for its own benefit, the expense thence arising would be charged to the cargo only;¹ and if, after the cargo is removed, the ship's stores are taken out, this is of no benefit to the cargo, and is chargeable to the ship only.² The question to which we have already referred more than once, and which, as we have seen, comes up in many cases of average and adjustment, is this: Do certain expenses which were incurred by the ship belong to her especial duty and obligation, or, lying outside of this duty, should they be considered as voluntarily incurred for the common benefit of the ship and cargo? It is this question which causes the difference between English and American adjudications, to which we have already referred. The English courts holding that, as the owners of a vessel are bound to keep her in repair, when she goes out of her way for the purpose of repair, the expenses thence arising are not a general-average loss, unless

The following charges appear to be of that description: attendance on the schooner coming into port; pilotage; harbor-master and health officer's charges; wharfage to unload and unloading; and, perhaps, the protest. *Wightman v. Macadam*, 2 Brevard, 230.

In a policy of insurance upon a steamer in the ordinary form, the hull and the machinery were separately valued, with a clause, "average payable on the whole, or on each as if separately insured." The steamer had discharged her cargo at C., and while she lay there, without any cargo on board, her hull was damaged by fire. To the cost of repairs to the hull, including the sum paid for surveyors' fees, after a deduction of the usual one third, it was proposed to add an additional sum expended in extinguishing the fire, so as to take the case out of the common three-per-cent memorandum. It was held by *Blackburn, J.*, that the parties must be understood to have agreed that any expenditure incurred

entirely and exclusively for saving the whole subject of insurance should, for the purpose of adjusting the loss on the policy, be treated as general average. *Oppenheim v. Fry*, 3 B. & Smith, 873.

¹ In a case where a boat was aground in five feet of water at her bow and eight feet at her stern, it was held that, if she had sunk in deep water, the unloading of the cargo might have been necessary for raising her; in which case, or at any rate, if unloading the cargo had sufficed to raise her, and she was to be repaired, the expense of unloading might have been a case for contribution, if the cargo was also benefited thereby; but if the cargo was unloaded for its own preservation merely, and not for the benefit of the boat, or if the boat were raised for its own benefit only, and not for the benefit of the cargo, there would be no general average for the expense of unloading in the first case, or of raising the boat in the last. *Firemen's Ins. Co. v. Fitzhugh*, 4 B. Mon. 160, 167.

² *Stevens on Average* (5th ed.) 22.

the repairs were made necessary by the voluntary loss or destruction of some part of the vessel for the common benefit.¹ Whereas,

¹ In the early case of *Lateward v. Curling*, G. H. Sittings after Trin. 1776, Lord *Mansfield* seems to have been of opinion that the expense of extraordinary wages and provisions during the time a ship goes into a port to repair is not the subject of general average, unless in a case of urgent necessity. The action was brought upon a policy of insurance on a ship to recover the amount of wages and provisions expended during the time the ship went from Bengal to Bombay to repair. His lordship decided against the action, but said that there might be cases where exceptions to the general rule should be allowed; but that, in order to consider a case as excepted, it must be an expense absolutely necessary, and such as could not possibly be avoided, owing to some of the perils stated in the policy. *Park on Insurance* (8th ed.) 288.

In *Da Costa v. Newnham*, 2 T. R. 407, tried twelve years later, it was decided that, where a ship was obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, became general average. The court laid stress on the fact that the sailors were not employed as such to make the repairs, but were discharged, and then hired anew as common workmen to perform this extra labor; intimating that, had they remained on board as sailors, the expense of their extra wages and provisions would not have been allowed. Mr. Justice *Buller* said: "As to the wages and provisions, this is not like the case where a ship is detained

by an embargo, where the court have said that the expense shall fall on the owner only, and the freight must bear it; but this is a question of general average, the ship having been obliged to go into port for the general benefit of the whole concern. A passage from *Beawes* is mentioned in *Park*, 148, showing the law in foreign countries upon this subject; that when a ship is forced by storm to enter into a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost, in such case the wages and victuals of the crew are brought into an average from the day it was resolved to seek a port to refit the vessel to the day of her departing from it, with all the charges of loading, unloading, anchorage, pilotage, and every other expense incurred by this necessity. But I do not know that this point has ever been settled in England. There is one case mentioned in the same book [*Lateward v. Curling*, *supra*], where Lord *Mansfield* seemed to approve of this rule; but it is not necessary to determine that point now, for it appears that the crew had been all discharged, and these men were only employed as common workmen."

In *Fletcher v. Poole*, Sittings after East. 1769, Lord *Mansfield*, and afterwards, in *Eden v. Poole*, Sitt. after Hil. 1785, and in *Robertson v. Ewer*, 1 T. R. 127, 132, Mr. Justice *Buller* held that the expense incurred for wages, provisions, &c., of the seamen during a detention to repair could not be allowed as a charge against the insurer on the ship, but must be borne by the freight. *Park* (8th. ed.) 116, 117. These decisions have been confirmed by the

in American law and practice, the going out of her way for necessary repair is itself a voluntary sacrifice or loss, on the part

recent case of *De Vaux v. Salvador*, 4 A. & E. 420; S. C. 6 Nev. & M. 713.

In *Plummer v. Wildman*, 3 M. & S. 482, one of the leading English cases upon this subject, a ship was run foul of by a brig, which was unavoidably driven against her by the violence of the wind and weather, by which accident her false stern and knees were broken, and the master was in consequence obliged to cut away part of the rigging of her bowsprit, and to return to port to repair the damage sustained by the accident and cutting away, without which repairs the ship could not have prosecuted her voyage or safely kept at sea. The action was brought for contribution for work and labor and for money paid. It was held that the amount of the expenses of repairing to be placed to the account of general contribution must be strictly confined to the necessity of the case, and that the arbitrator would have to determine how much was expended upon such repairs as were absolutely necessary to enable the ship, with her cargo, to prosecute the voyage; and that for so much, and no more, the defendant would be liable to contribute; but that the ship-owner must bear the captain's expenses in port during the unloading, repairing, and reloading, and that crimpage did not come under general average. Lord *Ellenborough*, C. J., said: "If the return to port was necessary for the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as

whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting the voyage, unless she returned to port and removed the impediment. As far as removing the incapacity is concerned, all are equally benefited by it, and therefore it seems reasonable that all should contribute towards the expenses of it; but if any benefit *ultra* the mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the ship-owner only, it will not come under the head of general average; but that will be a matter of calculation upon the adjustment."

In the subsequent case of *Power v. Whitmore*, 4 M. & S. 141, it was decided that the wages and provisions of the crew, while a ship remained in port, whither she was compelled to go for the safety of ship and cargo, in order to repair a damage occasioned by a tempest, were not the subject of general average; nor were the expenses of such repair; nor the wages and provisions of the crew during her detention in port, to which she returned, and was there detained on account of adverse winds and tempest, since there was here no sacrifice of any part by the master, but only of his time and patience, and the damage incurred was by the violence of the wind and weather. Lord *Ellenborough*, in the decision, referred to the preceding case of *Plummer v. Wildman*, and said, that "this was not like the case recently before the court, where the master was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed."

of the vessel, for the common benefit.¹ Our notes will show the adjudications on this subject. We should agree with the

In *Jackson v. Charnock*, 8 T. R. 509, A let his ship to B for a voyage, engaging to keep it in repair during the whole time, for which he was to receive freight on the return of the ship. It became necessary for the safety of the ship during the voyage to put into a port to refit. It was held that the expense of repairing must be borne entirely by A, and that B was not liable to contribute to it in proportion to his interest in the cargo, as for a general average. But here the court treated the question as depending wholly on the construction of the contract, in which the owner engaged to bear the expense of repairs. The decision, however, would doubtless have been the same in the absence of any such agreement, as the English law considers the ship-owner bound to repair, whether there are express stipulations to that effect or not.

The general principle of the English law deducible from these decisions appears, therefore, to be, that, if a vessel is compelled to put into port to repair a damage which is itself the subject of a general average, the necessary expenses thereby incurred to enable the ship to pursue her voyage may be the subjects of a general contribution; but that, if the losses sustained by the ship are of the nature of particular average, then the expenses incurred in repairing them give no claim to a general average, but must be borne by the ship-owner alone. Chancellor *Kent* says: "The result of the decisions in *Plummer v. Wildman* and *Power v. Whitmore* is, that where the general safety requires a ship to go into port to refit, by reason of some peril, the wages and provisions of the crew during the detention are not the

subject of general average; but the other necessary expenses of going into port, and of preparing for the refitting the ship, by unloading, warehousing and reloading the cargo, are general average. The costs of the repairs, so far as they accrue to the ship alone as a benefit, and would have been necessary in that port, on account of the ship alone, are not average. Yet if the expense of the repairs would not have been incurred but for the benefit of the cargo, and might have been deferred, with safety to the ship, to a less costly port, such extra expense is general average." 3 *Kent*, Com. 235, 236. In *Sharp v. Gladstone*, 7 *East*, 24, where a ship was forcibly detained in a foreign port, and the owner abandoned first the ship and then the freight to the different sets of underwriters thereon, who paid as for a total loss, after which the ship was liberated, reshipped her cargo which had been taken out, and returned home earning freight, which was received by the assured, it was held that the underwriters should contribute according to their respective interests, among other expenses, for the wages and provisions of the crew from their liberation in the foreign port till their discharge in the home port, and also for the wages of the crew during their detention, provisions being supplied by the foreign government. In *De Vaux v. Salvador*, 4 A. & E. 420, where a ship was insured with the usual warranty as to average, it was held that the expense of the wages and provisions of the crew, during the time that she was detained in repairing damage done to herself by perils of the sea, were not a loss for which the underwriters were liable.

¹ In *Padelford v. Boardman*, 4 *Mass.* 548, it was decided that when, in the

remark of Mr. Arnould, that there is hardly any point, even in course of a voyage, a ship insured, being damaged by winds and storms, voluntarily seeks a port to refit, the expenses consequent thereon, including the wages and provisions of the crew during the detention, are a general average; but that the repairs are a distinct charge upon the vessel. In noticing the cases of *Fletcher v. Poole*, and *Eden v. Poole*, *supra*, Mr. Justice *Seawall* said: "Both these cases exclude the circumstance of a voluntary and deliberate resort to a port for the particular purpose of refitting, with a view to the common safety of the vessel and cargo, and to avoid the impending danger of continuing the voyage without some necessary repairs." Again he says, p. 554: "A liberal construction in this respect appears conducive to the interest of insurers, in the benefit they derive from every reasonable precaution against impending and extraordinary risks, such as the continuing at sea with a vessel disabled in her sails and rigging. By rendering the concerned liable in a general contribution to defray the extraordinary expenses of seeking a port, and of the detention there to refit, the hazard from opposing interests is avoided; and a security common to all the concerned is purchased, as it ought to be, at their common risk and expense. Upon the whole, there may be some difficulty in deciding, under the circumstances of a particular case, whether a detention by any accident happening after the commencement of a voyage is or is not a case of general average. But when the case is established to be of that nature, and sailors' wages and provisions make a part of the expense necessarily incurred, this seems a sufficient reason for allowing them. The text-writers, and the ordinances and decrees of several great commercial republics favor it; and there is no opposing authority, applicable to the case supposed, in the decisions of this court, or of the courts of Great Britain, from whom our rules of maritime law are generally derived. But the definition of a general average, received in the courts of both countries, includes the wages and provisions of seamen, in cases like this now under consideration." It is to be observed, in explanation of the last sentences of this citation, that this case was decided before those of *Plummer v. Wildman*, and *Power v. Whitmore*, the latter being tried in 1815, and the former in 1808. In an earlier case in New York, it was held that if a vessel were, from sea damage, obliged to bear away to a port of necessity in order to refit, the wages and provisions, from the moment of bearing away to the period of sailing on her original voyage, constituted a subject of general average. *Walden v. Leroy*, 2 Caines, 262. In delivering the opinion of the court, *Kent, C. J.*, said: "It is necessary that the mariners should remain for the purpose of proceeding to the port of discharge, as soon as the inevitable misfortune, the *casus fortuitus*, creating the delay is removed. The cargo might be sacrificed at the intermediate port, if the crew were not to be detained, and the expenses of their detention, being for the common benefit, ought to be apportioned as a common burden." But *Livingston, J.*, in a dissenting opinion, said: "I am for confining a general contribution for *extra* wages and provisions to a case of capture, or where a vessel goes into port to avoid an enemy, or where some other step is taken by the master, *without any previous injury to the vessel alone*, evidently for the benefit of the whole, and with the view

the perplexed doctrine of general average, in which there is such a great diversity in the laws of mercantile states.¹

of escaping from an impending peril. All these cases rest on the same principle. No particular accident having happened to the vessel, which it is the owner's special duty and interest to repair, there is no reason why he should personally bear a heavy loss, which, in most of the cases put, is *voluntarily* incurred, to prevent a general one, greater still. Hence it will result, and perhaps a safer rule cannot be followed than the one suggested by Abbott, which is, that, if the injury to be repaired be not *of itself* an object of gross average, neither shall any of the incidental or consequential charges become so. If a shipper be not obliged to find materials, or carpenters, to repair injuries from tempest or stranding, why should he be taxed to pay or victual the crew?"

Where a vessel during her voyage puts into a port of necessity, and is repaired, and afterwards proceeds on her voyage, and is totally lost, the insured is entitled to recover the partial loss arising from the repairs, and general average consequent thereon, in addition to the total loss. *Saltus v. Com. Ins. Co.*, 10 Johns. 487.

Where a vessel insured, having lost her boat and camboose, and had her mainsail damaged in a gale, repaired the sail at sea with duck taken from the cargo, and purchased an old boat and camboose at a port of necessity, and, upon her arrival at home, sold the sail, boat, and camboose, and procured new ones, it was held that the loss was particular average; but other repairs made abroad from strict necessity to enable the vessel to return, and which were of no value after her return, were held to

come under general average. *Brooks v. Oriental Ins. Co.*, 7 Pick. 259.

If, after a vessel is disabled, the master can, in a reasonable time, communicate with his owners, it is his duty to do so before making repairs; and such delay does not relieve the owner of the cargo from contribution. *Sherwood v. Ruggles*, 2 Sandf. S. C. 55.

In *Sage v. Middletown Ins. Co.*, 1 Conn. 239, 243, the distinction mentioned in *Da Costa v. Newnham*, 2 T. R. 407, between the wages of the seamen, as such, during a detention, and the wages of extra workmen, or of the seamen discharged and hired anew as workmen, as subjects for contribution, is affirmed, and the reason upon which it is founded given. The court says: "The allowance of the charge for the services of the master and mariners was also incorrect. Mariners' wages are sometimes allowed during detention as a general average; but I find no case in which they have been allowed under circumstances like the present. This, however, is not a case presenting simply a charge for mariners' wages. It is an extra allowance for labor on the repairs, while they remained a part of the crew not discharged. If this were allowed against the underwriters, either the mariners would receive a double compensation for their services, or the owner would receive from the underwriters the price of day laborers for services paid by him at a less price by the month."

In *Dunham v. Com. Ins. Co.*, 11 Johns. 315, a ship was insured "at and from New York to Liverpool, and at and from thence back to New York." On her

¹ 2 Arnould on Ins. 911.

SECTION VII. — *Of the Value of the Contributory Interests.**A. Of the Ship.*

It may be doubted whether there is now any uniformity of rule or practice in regard to the contributory value of the ship,

outward voyage she sustained so much damage by tempests, &c., that on her arrival at Liverpool she was obliged to go into dock to be repaired, which detained her from the 1st of December, 1810, to the 24th of March, 1811. The cargo having been delivered, and freight earned before the 1st of December, it was held that the wages of the master and crew and provisions on board were not general average, and that the underwriters on the ship were not liable for them.

The case of *Wightman v. Macadam*, 2 Brev. (South Carolina) 230, was somewhat similar in principle. A vessel had been chartered by the defendant for a voyage from Charleston to Havana and back. The owner covenanted that the ship was tight, staunch, well fitted, tackled, and provided with every requisite, and both men and provisions fitting for the voyage. On the return voyage, in consequence of damage from the perils of the seas, the vessel was compelled to put into Savannah to refit. The cargo was landed, and delivered to the defendant, who paid a *pro rata* freight on the same, and sold it at Savannah. The plaintiff made a deduction for the freight from Savannah to Charleston. The action was brought for contribution, among other things, for the wages and sustenance of the crew during the detention. The court held that the defendant was not liable to contribute to this expense, as it was not necessary to the safety of the goods. But neither this case nor that of

Dunham v. Com. Ins. Co., *supra*, controverts the general principle of the American law upon the subject; for in both cases the cargo, having been delivered before the expenses in question were incurred, was of course in no way benefited by them. This fact determined the decisions in both cases; for in *Wightman v. Macadam*, the expenses incurred before the discharge of the cargo, namely, for attendance on the schooner coming into port, pilotage, harbor-master and health officer's charges, wharfage to unload, and unloading, &c., were allowed as subjects for contribution. And in *Dunham v. Com. Ins. Co.* the court says: "It is clear that the expenses for wages and provisions during the time the ship was detained at Liverpool cannot be brought into general average. They were not incurred for the benefit of cargo or freight. The cargo had arrived at its port of discharge, and had been delivered, and freight earned, before the expenses in question were incurred." So also the decision in *Williams v. Suffolk Ins. Co.*, 3 Sumn. 270, S. C. 13 Pet. 415, that the expenses of going into port to refit are general average only when the voyage has been or might be resumed; for if the voyage is abandoned, and the cargo is obliged to be transhipped, of course the expenses attendant upon the detention are in no way conducive to the benefit of the cargo, and there is accordingly no reason why it should contribute toward them.

In the case of *Union Bank of S. C. v.*

on an adjustment of general average. Ancient maritime codes prescribe certain rules, which are now no longer in use. They are collected by Mr. Stevens in his essay on general average, and we give in our notes a brief statement of them, because they are still serviceable to illustrate the principles which should be applied to this question.¹

Union Ins. Co., Dudley, S. C. 171, the English rule was adhered to; but there the policy referred to the usages of London as the standard by which the liabilities of the company were to be ascertained, although it was stated that the custom as to wages was the same in the city of Charleston.

The wages and expenses of the crew during repairs made at the port of delivery are not to be contributed for, even if the insurance be on time. Perry v. Ohio Ins. Co., 5 Ohio, 305.

In addition to those already cited, the American rule is sustained in the following cases: Clark v. United M. & F. Ins. Co., 7 Mass. 365; Potter v. Ocean Insurance Co., 3 Sumner, 27; Bixby v. Franklin Ins. Co., Ib. 46, in note; Peters v. Warren Ins. Co., Ib. 400; Henshaw v. Mar. Ins. Co., 2 Caines, 274; Spafford v. Dodge, 14 Mass. 66, 74; Barker v. Phoenix Ins. Co., 3 Johns. 307; Ross v. Ship Active, 2 Wash. C. C. 226; Thornton v. U. S. Ins. Co., 3 Fairf. 150; Hause v. N. O. M. & F. Ins. Co., 10 La. 1; The Brig Mary, 1 Sprague, 17, S. C. 5 Law Reporter, 75; Dyer v. Piscataqua F. & M. Ins. Co., 53 Me. 118, 122.

¹ By the Consolato del Mare, c. 94; the Code de Commerce, art. 304 and 401; the Ord. de la Mar. Tit. du fret, art. 7 and 20; des avaries, art. 3; du jet, art. 19; the Ordinances of Florence, Amsterdam, and Leghorn; the ship contributes for half her value. By the ordinances of Philip II., of Konigsburg, and of Portugal, she contributes

for her full value. By the ordinance of Hamburg, Tit. 21, art. 8, she contributes according to her true value in the state in which she comes from the sea, and the whole freight, deducting wages, pilotage, and other charges belonging to simple average. The ordinances of Prussia, of Genoa, of Spain regarding the commerce with India, and of Copenhagen, are to the same effect, Pruss. §§ 1868-1870; Stat. Jan. l. 4, c. 16, § *omnia jacta*; Recopilation de Leyes de las Indias, No. 80, l. 9; Tit. 39, Ley, 10. By the Ord. de Bilboa, art. 1 and 2, the ship contributes for her full value, as estimated by competent persons, the freight for one half, and the whole of what is paid by the passengers, if any. By the ordinance of Sweden the ship contributes according to her value as estimated by surveyors upon her arrival. But if she be valued in the policy, she contributes according to that value. The Danish articles have the same provision. If no valuation is made, the ship contributes according to her value at the place of departure, or at the time when the order for insuring her was given. Bencké, Pr. of Indem. 323, 324, 325. The laws of Wisbuy and the ordinances of Antwerp and Rotterdam provide that the owner of the ship shall contribute for her whole value, or her whole freight, at the option of the proprietors of the cargo. The custom in Holland was the same. Ad. Vermer, annot. p. 118. The Laws of Oleron gave the option to the owner. The Consolato

We consider that the general principle, whatever may be the method or difficulty of its application, is that stated more than fifty years ago by Mr. Justice Sewall: "In averages and contributions, the value, as between the parties interested in the adventure of property liable, is to be taken as it may be estimated at the time and place of its adjustment."¹ The various rules adopted at dif-

del Mare, cap. 96, provides that, if the master receives freight for his whole cargo, the same shall be included in the general contribution. By the ordinance of Louis XIV., No. 579, both ship and freight contribute for one half. The gross freight is only understood here. 1 Mag. 58.

The difference in these ordinances is easily reconciled, for it proceeds from the same grounds, viz. the impossibility of employing a ship in any voyage without wear and tear, and consequently losing the value she had when she commenced it, and the supposition that one half or one third of her freight would be expended in paying men's wages and other charges. 1 Magens, 58.

Quentin van Weytsen upon this subject says, *Tr. des Av.* p. 31: "They ought in reason and justice to carry in common contribution the whole value of the vessel, as well as the entire freight which the master receives for the voyage." Upon this passage Mr. Stevens says: "This, which was his opinion in 1563, is now the practice in England." Stevens & Benecké on *Av.* (Phil. ed.) 211.

¹ *Clark v. United M. and F. Ins. Co.*, 7 Mass. 365, 370. In this case a ship was insured from the United States to Cork or Liverpool, either or both, for two thousand dollars, — fifteen hundred on the vessel and five hundred on the cargo, the vessel being valued at six thousand dollars. In consequence of the fog, and contrary to the intentions of the master, the ship passed Cork,

and, finding it impracticable to beat back to that port, although it was practicable to go to Liverpool, the master bore away to Dublin to gain information of the state of the markets, and in the course thither a loss was incurred. It was agreed by the parties that the expenses and damages incurred by the disaster, computed at the sum of \$ 4,924, should be adjusted as a general average upon the ship, cargo, freight, and a deck load; that in this adjustment the value of the property as at Dublin should be taken, and that the ship was there worth \$ 8,000, — \$ 2,000 more than at the commencement of the voyage, — the cargo, \$ 5,510; the freight, \$ 1,094; and the deck load, \$ 332; that there had been sustained and paid thereon a loss and contribution of 28½ per cent; and that the value of the cargo, as shipped, was \$ 2,000. The action was brought upon the policy by the part owner of the ship and cargo for the amount contributed by his part thereof towards this loss. The court were to determine what sum for the loss demanded was recoverable upon the policy, — whether the whole sum supposed to be assessed upon the plaintiff, and paid by him, upon his quarter part of the ship and cargo, or only the same rate of loss upon the sum insured which was paid upon the supposed valuation at Dublin. After stating the rule given in the text, and which he mentions as having been derived from usages established in England and recognized in judicial decisions there and in Massa-

ferent times in different nations have been intended only to ascertain this value. In practice, if the ship be sold, this is usually taken as fixing her contributory value.¹

chusetts, Judge *Sewall* continues: "The effect of this subsequent valuation, in determining the proportion of loss recoverable by the assured in a case of general average, has not been settled, I believe, by any judicial decision; and I have not found any rule or usage respecting a case where the circumstance has occurred of a valuation in adjusting a general average materially varying from the value of the property as insured. The reason may be that the case is very unusual where goods are to be estimated at a very considerable advance and profit, besides the expense of freight, in adjusting a contribution for salvage at their port of discharge; and it may at least be conjectured that never before did a vessel become a third part more valuable in a foreign port, and after a long voyage, than she was in the port from which she sailed, and at the commencement of her voyage; unless by means of some addition and repairs of an extraordinary nature made in the course of the voyage. . . . Nor is a vessel, generally speaking, an article upon which a profit in a foreign market can be insured or expected; nor is it usually sent to a foreign port for sale. It is rather the instrument of trade and business, like a shop or warehouse, than the immediate subject of traffic; and the voyage and employment are ordinarily estimated as a diminution of value to a vessel, and as a matter of expense to the owner, for which he expects an indemnification in the hire or freight, or in the profits accruing from the use of the vessel in the carriage of his own goods. It is perhaps upon these considerations that

a variety of positive regulations have been established from time to time in foreign states, as to the *degree* in which a ship shall be liable to contribute in a case of general average. . . . It is the opinion of the court that the defendants are liable in the proportion which the sum underwritten by them upon the vessel bears to the actual value of the vessel when insured; and the valuation stated in the policy is not to be regarded."

The owners of the ship contribute according to her value at the end of the voyage, and according to the net amount of the freight and earnings. 3 Kent, Com. 242; Benecké, Pr. of Indem. 310, 311; Abbott, on Ship. 503; 2 Mag. 237; *Spafford v. Dodge*, 14 Mass. 66, 80; *Gillett v. Ellis*, 11 Ill. 579. The ship's provisions are not to be added to the value, though the accident happened at a time when much of them remained on board; because they are destined to be consumed during the voyage, and consequently belong to wear and tear. Benecké, 311; *Brown v. Stapleton*, 4 Bing. 119. But in all those cases in which the cargo is obliged to contribute for its value at the time of the accident, without reference to a subsequent diminution, the vessel ought to contribute also for that value, this being the only way of placing all parties upon an equal footing. *Ibid.*

Where a ship after a jettison is wrecked, but a part of its materials are saved, these contribute according to their value as saved, the expense of salvage being deducted. *Dodge v. Un. Mar. Ins. Co.*, 17 Mass. 471.

¹ *Bell v. Smith*, 2 Johns. 98; *Lee v. Grinnell*, 5 Duer, 400, 429.

There is no doubt that in most cases it would determine this value with sufficient accuracy; not always, however, for it is obvious that the price might be increased or diminished by extraneous circumstances, which should not be considered in determining the contributory value.¹

If the value of the ship when she sails be ascertained, this is certainly a step towards ascertaining her value when the adjustment is made. But it is only a step; for not only is she older, and must have been subjected to some wear and tear, but she may be greatly deteriorated in value. There are many rules in the law-merchant which seem to be arbitrary, but are in fact founded upon the average of cases, and therefore work well on the whole, although especially adapted to no one case. The rule one third off new for old, of which we have already spoken, is one of these. In some of our States a rule of like kind has been applied to this question; and one fifth of the value which the ship had when she sailed is deducted to give her contributory value.²

¹ Speaking of this rule, Mr. Stevens says: "There is no general rule, however, that will serve for all cases of this nature; for, even on the above principle, if the voyage end at a foreign port, or at a place where there is no demand for shipping, or, on the contrary, where there is a very great demand, the value of the ship will be decreased or increased by such adventitious circumstances, but which ought to have no weight in an equitable apportionment." Stevens & Benecké on Av. (Phil. ed.) 213.

In *Gray v. Waln*, 2 S. & R. 229, the court says: "The defendant contends that it is the sum the ship would have sold for at Algeiras or Gibraltar, and insists on the impropriety of valuing the goods by one rule and the ship by another. But the same reason does not hold for the valuation of the goods and the ship. The goods are intended to be sold at the port of destination, and, being selected for that market, may be

supposed in general to fetch a good price there. Not so the ship, which in many cases delivers her cargo, and returns to the place where the voyage originated, her owners having had no intention to sell her at the port of delivery, which they may have known to be no market for ships. It would seem more just, therefore, to value the ship according to the price she would have borne at the place where the voyage commenced, deducting the expense of carrying her there."

• In regard to the deduction mentioned in the last clause, Mr. Phillips observes: "But this is supposing her to come home empty, which by no means is a necessary supposition. 2 Phil. on Ins. § 1383.

² *Leavenworth v. Delafield*, 1 Caines, 573; *Gray v. Waln*, 2 S. & R. 229. This is the rule in New York. In *Gray v. Waln* the court said: "I am the more inclined to be satisfied with it, as it is more equitable, more certain, and

In other States this rule is not made use of,¹ and even in those States in which it is adopted it would seem not to be applied when the value can be obtained more exactly.

We incline to think that the rule laid down quite recently, in an interesting case in the United States District Court of New York, may be regarded as giving the present rule of practice. It is substantially this: the value of the ship at the port of departure is to be taken; from this a reasonable deduction is to be made for wear and tear, and for deterioration in value, and what this deduction should be is to be determined by the best evidence which the case admits.² We give in our notes the principal adjudication on this subject.

Where contribution is made to the ship because of damage caused to her for the benefit of the contributory interests, the damage to be contributed for is the actual cost if the repairs are made, or the estimated cost if they are not yet made; and

less liable to accidental fluctuation than the rule contended for by the defendant." But in *The Mutual Safety Ins. Co. v. The Cargo of the Ship George, Betts, J.*, said: "The rule is that a reasonable allowance shall be made for wear and tear, and there would manifestly be great conveniency in possessing a criterion which should infallibly fix that amount; but without the support of notorious usage and custom to a uniform scale of depreciation of a vessel by performing the whole or any portion of her voyage, it must be sheer conjecture with the court to pronounce the abatement of one fifth, or one half, or any other aliquot of the value of the ship when sound a reasonable measure of its worth at the time of loss."

¹ It has not been adopted in Massachusetts. *Spafford v. Dodge*, 14 Mass. 66; *Douglas v. Moody*, 9 Mass. 548.

² *Mutual Safety Insurance Co. v. Cargo of the Ship George, Olcott, Adm.* 157, S. C. 8 Law Rep. 361.

The adjustment is to be made in the same manner, whether the ship, freight,

and cargo belong to the same or to different persons. *Spafford v. Dodge*, 14 Mass. 66, 79; *Jumel v. Mar. Ins. Co.*, 7 Johns. 412, 425.

The contribution is to be adjusted according to the value of the respective articles saved, at the time and in the place when and where the expense was incurred, in like manner as if all the three parties had been present, and each had originally paid his own proportion. *Spafford v. Dodge*, 14 Mass. 66, 80; *Douglas v. Moody*, 9 Mass. 548, 554.

If the contribution is claimed for goods thrown overboard, or for a mast cut away, the adjustment must necessarily be postponed until the termination of the voyage; because, until that event, it cannot be known whether anything will be saved from which to claim a contribution, and also because each party will be held to contribute according to the value of what shall come to his hands at the termination of the voyage. *Spafford v. Dodge*, 14 Mass. 66, 80.

in either case one third is to be deducted, under the rule of one third off new for old.¹

B. Contributory Value of the Freight.

There is of course no contribution by the freight, unless it be earned, and by only so much as is earned.² But the earning of freight is always at a certain cost. The ship is kept in a

¹ 3 Kent, Com. 243; Abbott on Shipping (8th ed.) 609; *Da Costa v. Newnham*, 2 T. R. 407, 408, 412; *Dunham v. Com. Ins. Co.*, 11 Johns. 315, 321; *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, 269; *Byrnes v. National Ins. Co.*, 1 Cow. 265, 273; *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191, 196; *Giles v. Eagle Ins. Co.*, 2 Met. 140, 144. This deduction of one third new for old is allowed, upon the supposition that the vessel, after being repaired, is in better condition than she was at the commencement of the voyage, in consequence of new materials having been substituted for old. And as the contract of the underwriters is one of indemnity merely, it is equitable that a deduction should be made from the cost of the repairs, equal to the enhanced condition of the vessel. *Byrnes v. National Ins. Co.*, 1 Cow. 274. In England this deduction is made from the repairs of a ship, if she has met with an accident, only in her second voyage; for if the injury is sustained and the repairs made in the first voyage, the vessel being new, it is not to be supposed that she is put in better condition by the repairs. *Weeskett on Ins.* 456; *Byrnes v. Nat. Ins. Co.*, 1 Cow. 274. But this distinction has not been adopted in New York. *Byrnes v. Nat. Ins. Co.*, *supra*; *Dunham v. Com. Ins. Co.*, 11 Johns. 315, 321. The deduction is not made unless the ship gets into the possession of the owner

again, the usage being founded on the idea that the owner gets the ship the better for the repairs. *Da Costa v. Newnham*, 2 T. R. 408, 412; *Smith v. Bell*, 2 Caines, Ca. 153, 156. The one third is not deducted from the gross amount of the expenses for repairs, but from the balance after first deducting from that amount the value of the old materials, which are considered as still belonging to the assured. *Byrnes v. National Ins. Co.*, *supra*; *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, 269. The customary deduction of one third new for old is applicable only to the labor and materials employed in the repairs, and to the new articles purchased in lieu of those which are lost or destroyed; and it does not apply to other incidental expenses, having no connection with the repairs or new articles furnished, and from which the assured can possibly derive no enhanced benefit or value beyond his loss, such as steamboat towage, boat hire, &c. *Potter v. Ocean Ins. Co.*, 3 Sumner, 27. The rule of one third new for old, in the law of marine insurance, is applicable to the insurance of steamboats on the Western waters. *Wallace v. Ohio Ins. Co.*, 4 Ohio, 234, 242.

² *Potter v. Prov. Wash. Ins. Co.*, 4 Mason, 298; *Lee v. Grinnell*, 5 Duer, 400, 431; *Maggrath v. Church*, 1 Caines, 196, 215.

condition that it may earn freight, and the wear and tear and natural decay of the ship while the freight is being earned, the wages and provisions of the crew, and all expenses attending navigation, are for the most part a fair charge against the contributory value of the freight.

As a matter of principle, the test is this; so much of the freight as is saved by the sacrifice contributes;¹ but the expenses sub-

¹ In *Williams v. London Ass. Co.*, 1 M. & S. 318, a ship was chartered from London to the East Indies, there to deliver her outward cargo and return thence with a cargo for England into the Thames, and there make a true delivery, &c; and it was agreed that the charterers should, upon condition that the ship performed her voyage and arrived at London, and not otherwise, pay freight for every ton of goods that should be brought home at so much per ton. The ship, in the course of her outward voyage, incurred an average loss, but was repaired and afterwards performed her voyage, and the freight was received. It was held that the freight was liable to contribute to general average, and that the underwriter upon a policy on the ship for the outward voyage was entitled to deduct in respect to this contribution. Lord *Ellenborough*, C. J., said: "This is the case of an insurance on the outward voyage, on a ship chartered for a voyage out and home; in the course of which outward voyage an average loss has happened; and the question is, whether the freight payable under the charter-party is liable to contribute to general average. It is contended that the whole freight out and home is not liable; but the whole was affected and might have been frustrated by the loss, and was eventually preserved to the owners by the repairs done to the ship. It is true indeed that if this action had been commenced immediately upon the loss hap-

pening, it would not have been open to the defendants to say that the plaintiff was recouped in damages by a contribution in respect of freight which at that time was contingent. But the case now before us is argued upon an admission that the freight has actually been received; and therefore now the amount of the damages must be that of the original damage, minus the amount of the plaintiff's contribution; and the difficulty as to the outward and homeward voyage seems to be removed by the consideration that the whole freight was saved by the repairs." A jettison of the cargo constitutes a case of general average, to be borne by the ship, freight, and cargo ultimately saved. The *Ship Nathaniel Hooper*, 3 Sumner, 542, 549. Where an average loss occurred before the vessel sailed, it was held, that as the voyage was not commenced, and the loss of freight could not be attributed to the circumstances creating the general average, the freight was neither to contribute nor be contributed for. *Lee v. Grinnell*, 5 Duer, 400, 431. Freight is liable, in some cases at least, upon a chartered ship, to contribute to salvage. The *Racehorse*, 3 Rob. 101; *Cox v. May*, 4 M. & S. 152, 159; The *Dorothy Foster*, 6 Rob. Adm. 90. General average is in this respect analogous to the case of salvage. The principle upon which freight is to contribute in the case of general average is, that it was one of the things in hazard at the time when

sequent to the sacrifice, which are necessary to the earning of the freight, are not saved, for they must be incurred at all events. If a ship makes a sacrifice, and three months afterwards reaches, with the saved cargo, its port of destination, and thereby earns a freight of ten thousand dollars, all of this is not clear gain. Only that part of it is so which is over and above the necessary cost, subsequent to the sacrifice, of earning this freight.

The extreme difficulty of applying this rule in détail — that is to say, of estimating exactly what share of these expenses should go in diminution of freight — has led in this case, as in many others in the law of insurance, to which we have referred, to the adoption of a practical rule founded on the average of cases.

In New York the freight contributes on one half of the gross amount earned,¹ considering the other half as expended in earning this half. This, however, is a larger allowance than is usually made. The prevailing rule in this country is to apportion the

that sacrifice which produced the general average was made; and the principle upon which it contributes in the case of salvage is, that but for the recapture, for which the salvage is paid, it would have been lost. *Cox v. May*, 4 M. & S. 152, 159. Where a ship from New York, destined to Madeira, was obliged, being disabled by perils of the sea, to put into Philadelphia, where the cargo was sold, it was held that the freight actually gained or earned in the voyage, and not what the vessel would have earned if she had gone to Madeira, should contribute to an average loss which had been incurred. *Maggrath v. Church*, 1 Caines, 196, 215. If the cargo arrives in safety at the port of destination, the freight is brought into the contribution; but where the voyage is broken up near the port of departure, and the vessel has not adopted any intermediate port, as and for the port of destination, but has returned home, and the freight has not been saved by the jettison, the contribution to the general average loss should be between the ship

and the cargo. *Tudor v. Macomber*, 14 Pick. 34, 39.

¹ *Leavenworth v. Delafield*, 1 Caines, 573; *Heyliger v. N. Y. Firem. Ins. Co.*, 11 Johns. 85. In *Leavenworth v. Delafield*, the court observes that this rule may be deemed arbitrary, but that it will, perhaps, come as near as any other to producing a contribution in proportion to the real interest of each which may be in jeopardy, inasmuch as the freight will not clear to the owner more than, if as much as, one half what is contracted to be paid. This is also the rule in France, and in regard to it Pothier remarks: "As the freight is only due to the owner of a vessel, as a kind of indemnity for her deterioration and expenses incurred by the voyage, it is subjecting him to a double burden to make him contribute for the entire value of the vessel and of the freight. Our ordinance, therefore, has adopted the middle course of making him contribute for one half of the value of each." Pothier's *Maritime Contracts*, vol. 2, n. 119, p. 411.

general average of contribution on two thirds of the gross amount of freight earned.¹

It is said that in England only the wages are deducted.² Where any rule on this point exists, we suppose it to be applicable to all cases of freight saved and earned. It was held in one case in Massachusetts that this rule did not apply to cases of capture and subsequent release,³ but this decision was not long after overruled.⁴

If the voyage has many parts, that is, if the ship carries cargo to many ports, and earns freight at each port, the question has arisen whether, in the adjustment, the freight held to be contributory should be only that to the first port that the vessel reaches after the sacrifice, or the whole freight to the end of the voyage. The circumstances of such cases vary so much as to make it difficult to give a certain rule. If, however, the freight to the end of the whole voyage is certainly that which is saved by the sacrifice, it would be difficult to see why this whole freight should not contribute. If the vessel was chartered for the whole voyage, and, by the terms of the charter, one whole freight was payable at the end of the whole voyage and nothing before, this would seem to strengthen the reason for saying that the whole freight should contribute.⁵

¹ *Humphreys v. Union Ins. Co.*, 3 Mason, 429, 439. In *Mutual Safety Ins. Co. v. Cargo of The Ship George, Olcott*, Adm. 157, it was held that the freight should contribute at its gross value, deducting therefrom all necessary expenses incurred, if any, subsequent to the wreck.

² Marshall on Ins. 467. It is the same in the *Consolato del Mare*, and the ordinances of Philip II., Genoa, Königsburg, Hamburg, and Copenhagen. See *Stevens & Benecké on Average*, 215, 217.

³ *Douglas v. Moody*, 9 Mass. 548.

⁴ *Spafford v. Dodge*, 14 Mass. 66, 81.

⁵ If there is a charter-party, and freight is to be paid for the round voyage out and home, and the principal object of the voyage is to obtain a re-

turn cargo, if a loss occurs on the outward voyage, the freight for the round voyage contributes. *Shelton v. Brig Mary*, 5 Law Reporter, 75; S. C. 1 Sprague, 17. In *Williams v. London Ass. Co.*, 1 M. & S. 318, of which we have given a statement, *supra*, p. 333, n. 1, *Bayley, J.*, said: "Here the plaintiff had a vested right of freight; he had some freight then actually due, and the whole was put in hazard, and the whole has been ultimately earned. The difficulty raised in argument is this, that a thing is not to contribute unless ultimately saved, and that it was uncertain at the termination of the outward voyage whether the freight would be saved; but this freight was one entire and indivisible sum payable for the use of the ship out and home; therefore

But if the ship, on its arrival at a certain port, delivers there a part of the saved cargo, and receives its freight for that part, and then carries forward the remainder of the saved cargo, and on her arrival receives freight for this remainder, it is difficult to see why the freight to the last port is not as much saved by the sacrifice as the freight to the first port; or why, if so saved, it should not contribute.

If the vessel on arriving at the first port delivers there the whole of the saved cargo, and is paid for it, and takes there a new cargo for another port, it is a different case. Even here it might

when ultimately earned, having been put in hazard and saved, it ought to contribute." Benecké, however, criticises the decision in this case. He says: "It is, however, with all deference, my private opinion that, in cases of this description, the freight ought to be divided, notwithstanding the stipulation in the charter-party, and such part only ought to contribute as may fairly be presumed to belong to the outward voyage. Considering, in the first place, the liability of contributing towards a general average as between the owners of the ship and those of the cargo, without reference to a particular stipulation exempting the cargo from contribution, it is not difficult to see that, if the freight were not to contribute at all, the ship-owner would gain the chance of earning freight at the expense of the proprietors of the cargo; and that, on the other hand, if the whole of the freight for the voyage out and home were made to contribute, the freight would run the double risk of a general average, while that of the cargo were only single; for the risk of a general average taking place upon the voyage out and home is double that of the same event occurring upon a single voyage. Had the vessel in the above case incurred another general average upon her voyage home, the whole freight for

the voyage out and home would, according to the same principle, have been liable to contribute to this also, whilst the outward-bound cargo only would have contributed to the first, and the homeward-bound cargo only to the second general average." Benecké, *Pr. of Indem.* 315; Stevens & Benecké on Average, 258.

The court, in giving salvage upon freight, makes no separation as to minute portions of the voyage. If a commencement has taken place, and the voyage is afterwards accomplished, the whole freight is included in the valuation of the property on which salvage is given. *The Dorothy Foster*, 6 Rob. Adm. 88, 91. In *The Progress*, 1 Edw. Adm. 210, 224, the court says: "If there had been two distinct voyages, as is sometimes the case in charter-parties, distinguishing the outward from the homeward voyage, the case would have assumed a different aspect; but where a ship goes out under a charter-party to proceed to her port of destination in ballast, and to receive her freight only upon her return, the court is not in the habit of dividing the salvage." These decisions as to salvage would apply as well to general average, as the two are, in respect to the contribution of the freight, analogous. *Cox v. May*, 4 M. & S. 152, 159.

be said, that, if the ship be enabled by the sacrifice to earn this second freight, this second freight should not be a contributory interest. We think it more reasonable, however, to say that, so far as the freight is concerned, if not in all respects, the voyage ends when the whole cargo is delivered. Of course no freight earned previously to the sacrifice contributes, because it is not saved thereby.¹ Where the ship is disabled in the course of the voyage, and the master is able to discharge his duty of sending the cargo to its destination in another ship, the freight which is saved is the excess of what is earned over the cost of transshipment.²

SECTION VIII.— *What Goods contribute, and what is their Contributory Value.*

MUCH question has been made as to what property contributes to general average, as a part of the cargo. The rule laid down by Magens is, that what pays no freight pays no average.³ But we agree with Mr. Stevens, that this is an insufficient and unreasonable rule.⁴ Lord Tenterden says that all articles should contribute, which are carried in the ship for the purpose of traffic, whether they belong “to merchants, to passengers, to the owner, or to the master.”⁵ And Lord Ellenborough also makes this purpose of traffic the test of the contributory interest.⁶ Benecké

¹ *Spafford v. Dodge*, 14 Mass. 66, 80; *Dunham v. Com. Ins. Co.*, 11 Johns. 315. See further, as to contribution by freight, *Da Costa v. Newnham*, 2 T. R. 407, 415; *Padelford v. Boardman*, 4 Mass. 548; *Col. Ins. Co. v. Ashby*, 13 Pet. 331, 344.

² *Dodge v. Union Mar. Ins. Co.*, 17 Mass. 470, 478. In this case a vessel, on a voyage from Siam to Amsterdam, sprung a leak, and put into the Isle of France in distress, where she was totally lost. The cargo was sent forward to Amsterdam in a Dutch ship. In an action for general average for the expenses incurred at the Isle of France, the court decided that among the contributory interests was the freight from

Siam to Amsterdam, deducting what was paid to the Dutch ship. See also *Searle v. Scovell*, 4 Johns. Ch. 218.

³ 1 Magens, 62.

⁴ Mr. Stevens says that this rule should not be construed literally, for it would be very unjust that the master or owner, or any other person who had goods on board, should not contribute, merely because he paid no freight for the carriage of them; but all the goods on board ought to contribute, and the goods are the wares or cargo for sale laden on board the ship, whether it pays freight or not. *Stevens & Benecké on Av.* p. 206.

⁵ *Abbott on Shipping*, 502.

⁶ *Hill v. Patten*, 8 East, 373, 375.

and Emerigon apply a different test; they hold that whatever should be contributed for, if jettisoned, should contribute if saved; and on this ground say that the trunks and luggage of passengers should contribute.¹ All this may be defended on principle, and it seems that the Roman law included all goods on board of any kind.² But by the general and we think uniform practice, the baggage of passengers of every kind does not contribute.³

In an English case, the question whether provisions for passengers should contribute was considered.⁴ It was a convict ship, and the value of the stores and provisions put on board by govern-

¹ Benecké, Pr. of Indem. 308; Emerigon, Traité des Assurances, ch. 12, § 42, p. 645.

² Digest, 2, 2, 2. See also 2 Molloy, ch. 6, § 14.

³ Magens says that he does not remember ever to have met with any regulation of a general average, where the apparel and jewels of passengers were brought into the contribution. 1 Mag. 62. See also Abbott on Shipping, 503; Stevens & Benecké on Av. (Phil. ed.) 206, 251; 2 Phil. on Ins. § 1394; Valin, Ord. de la Mar. tom. 2, l. 3, tit. 8, art. 11. Emerigon, though maintaining the principle that the trunks and luggage of passengers should contribute, says that he has never known an instance where this has been put in practice. Tom. 1, p. 645.

⁴ Brown v. Stapleton, 4 Bing. 119. In this case the counsel argued, that, in a ship hired to carry convicts, the convicts were themselves the cargo, and not like passengers in ordinary cases; that the provisions and convicts were in effect the *merces* of the voyage, and, therefore, distinguishable from the case where the provisions are for a few passengers, and of small comparative value. In giving the opinion of the court, Best, C. J., said: "It is not every object of value which has been held liable to a

contribution for average, but only such stores as are termed *merces*. *Merces* has never been held to extend to provisions, but includes only the cargo put on board for the purposes of commerce; and the practice shows that this has been the understanding of all times. Magens, Molloy, Beawes, Stevens, and other writers, all expound the word *merces* in this way; all in terms exclude provisions. They concur in saying, that things of light weight, but of considerable value, must contribute, if they belong to the cargo, but not if they belong to the passengers. Provisions are laid in for the passengers, and must be esteemed to belong to them. Further than this, the ship is always brought into average according to her reduced value at the end of the voyage, when the provisions have mostly been consumed. As to the argument that the convicts must be esteemed the *merces* upon this voyage, and so the stores laid in for them be chargeable as parcel of the *merces*, it is clear that, whether cargo or not, they cannot be brought into contribution, because human life is not the subject of average. If, therefore, the convicts themselves cannot be brought into contribution, much less can the provisions, which are merely accidental to their passage."

ment for the convicts was very large. But it was held by all the judges of the Common Pleas, that they should not contribute. The reasons offered by the counsel for the plaintiff, and by the court in their decision, cover the whole ground; the counsel resting his claim on the assertion that the provisions in this case were a cargo, and the court denying the claim of the plaintiffs, on the ground of the custom, which, as they say, limits the contributory liability to merchandise.¹ We believe this to be the law in England, and the practice there and here.

The mere size or bulk of the goods does not enter into this question. It is always said that the precious metals and precious stones, and other small articles of great value, contribute.²

¹ Neither passengers nor crew are called on to contribute for their personal safety. Dig. 14, 2, 2, 2; Guidon, ch. 5, art. 26; Cleirac, p. 45; Emerigon, ch. 12, § 42, § 8 (Meredith's ed.) 495; *Brown v. Stapleton*, 4 Bing. 119; *Weston v. Train*, 2 Curtis, C. C. 49, 59. Neither do the wages of mariners contribute. Pothier on Maritime Contracts (Cushing's ed.) p. 72, n. 126; Emerigon, ch. 12, § 42, § 7 (Meredith's ed.) 494; Consolato del Mare, c. 281, 293.

² *Park on Ins.* (8th ed.) 296; *Millar on Ins.* 344, 345; *Weskett on Ins.* 130, 131; Dig. 14, 2, 2, 2; *Nelson v. Belmont*, 5 Duer, 310; *Peters v. Milligan*, before Mr. Justice Buller, Sittings at Guildhall after Mich. 1787, cited in *Park on Ins.* 296; 1 *Magens*, 62; 1 *Emerigon*, 639; *Bevan v. Bank of U. S.*, 4 Whart. 301, *infra*, p. 346, n. 3. *Emerigon*, p. 639, states very succinctly the reason of the rule: "The more valuable a thing is, the more it is for the interest of the owner that the ship in which it is should not perish"; and *Magens* says that it is customary in London, and most other countries, for the proprietors of whatever gold, silver, or jewels pay freight in merchant ships to contribute to a jettison for their full value; for, the masters being obliged, by all sea laws,

to throw out, in case of need, what is heaviest and of least value, and the worth of such precious commodities being known, the care of them will be increased in proportion to their worth, to prevent their being thrown overboard promiscuously with other things; and hence their preservation redounds to the common benefit. Mag. 63. In *Bevan v. Bank of U. S.* the court says: "In case of a general average, on account of part of the cargo being ejected for the purpose of saving the ship and residue of the cargo, the owners of specie, diamonds, or precious stones are required for having such preference allowed to them, in the retainer of their portion of the cargo on board, to contribute towards making good the loss sustained by those whose goods are ejected, according to the value of the specie, &c., and not according to their weight or bulk, which, being of but small account, would not have tended to preserve the vessel and remaining part of the cargo, even if they had been thrown overboard." Lord *Kames*, however, in his work on the Principles of Equity, p. 116, while admitting this to be the rule, controverts its propriety, and maintains that the contribution should be according to weight, and not value.

Mr. Arnould says of these things that they contribute, "unless carried about the person or forming part of the wearing apparel."¹ It is difficult to see why the same thing should contribute if carried in a trunk, and not contribute if carried in the pocket.² It is however true that, in the English case above referred to,³ merchandise is said to include all articles of great value not carried on the person. The same distinction would apply, we think, to bank-bills. They should not contribute, unless they are merchandise, which they seldom or never are.⁴ We agree with Mr. Phillips, that they should not contribute, but not altogether for the reason that he gives,⁵ — that they are not so properly actual property as the evidence of demands, which may be supplied by other evidence if they are lost.

One important exception to the rule, that only those goods contribute which are contributed for, occurs in the case of goods carried on deck. We have seen, by the general rule, that they are not contributed for, but they always contribute. We know but one decision to this effect;⁶ but the practice is uniform.

¹ 2 Arnould on Ins. 919. All property on board the vessel at the time of the jettison, and saved, unless attached to the persons of the passengers, is to be brought into contribution. *Harris v. Moody*, 30 N. Y. 266.

² Magens appears to make no distinction between valuables carried in the trunk or about the person of the passenger; for he says that in voyages from Cadiz and Lisbon, where the carriage of gold and silver makes a great part of the ship's profit, or freight, if a person, under the cloak of going passenger, should conceal, either in his trunks or about his body, any such considerable sum of money, or jewels, as would not be suffered without paying a freight, he must, when discovered, not only satisfy the freight, but also contribute to any jettison. 1 Mag. 63.

³ *Brown v. Stapleton*, 4 Bing. 121.

⁴ *Weskett*, tit. Contribution, n. 15, citing 2 Valin's Com. 200, classes bills

with money, jewels, &c., as articles that ought to contribute. But in the case of *The Emblem*, *Daveis*, 61, it was held that bills of exchange, saved from a wreck, were not liable for salvage, from which it would follow that they would not be bound to contribute in general average. In *Harris v. Moody*, 30 N. Y. 266, it was held that bank-bills of individuals, so carried for them in a crate, by an express company, which company, by an agreement with the owners of the steamboat, pay such owners a fixed sum annually for the carrying of a stated number of portable crates, with the contents thereof, are bound, when saved, to contribute for such a loss.

⁵ 2 Phil. on Ins. § 1397.

⁶ *Emerigon*, ch. 12, § 42, p. 639; *Code de Com.* l. 2, tit. 12, *Du Jet.* a. 232; *Consolato de la Mare*, art. 13, tit. *du Jet.* ch. 183; *Stevens & Benecké* on *Av.* (Phil. ed.) 210, 248. Goods carried

We do not consider that the question, whether public property is exempt from contribution, has been positively determined by direct adjudication. There would seem to be no good reason for this exemption.¹ In one American case, the court were of opinion that public property could claim no exemption from contribution, and that the right of the master to retain the goods until the contribution was paid extended to public property.² In the

on deck, according to the custom of the trade, by steamboats navigating Long Island Sound, and stowed in the usual way, are liable to contribution by way of general average for a loss occasioned by a jettison of other goods necessarily thrown overboard under stress of weather and while subjected to the perils of the sea.

¹ 1 *Magens*, 63, 172; *Us et Coutumes de la Mer*, 20; *Jug. d'Oleron*, c. 8, n. 8. *Magens* says the reason is that, "in goods belonging to his Majesty, all his subjects in general are concerned; wherefore for any particular loss of them no particular contribution is necessary, because it is supplied by the general contribution of the whole community." But *Valin*, tom. 2, p. 184, tit. *Des Av. a. 11*, n., thinks there is no reason for this.

² *United States v. Wilder*, 3 *Sumner*, 308. This was an action of trover brought by the government to recover certain property detained by the defendant. The facts were the following: The schooner *Jasper*, from Boston to New York, went ashore on Block Island. Much expense was incurred in saving the goods, which gave rise to a claim of general average. Among the property on board there were about one hundred bales of slop clothing belonging to the United States, invoiced at \$7,320. The goods being brought back to Boston, the owners of the vessel made out an average bond for the freighters

to sign. The store-keeper of the United States (by whom the clothing was shipped) declined to sign the bond, claiming for the United States the right to take the goods, without paying or securing their contribution to the average. This right being denied by the ship-owners, they refused to deliver the clothing, and this action was brought to recover its value. The case was tried before Mr. Justice *Story*, from whose opinion we make the following extracts: "The sole question in the present case is, whether there exists a right of lien for the general average due on the goods (slop clothing) belonging to the United States, under the circumstances stated by the parties. There is no dispute that there has been a general average in this case, towards which all the goods on board, and among others the slop clothing of the United States, are to contribute. There is as little doubt that for such general average there does exist, on the part of the master and owners of the schooner *Jasper*, a right of lien against all the goods belonging to all the other shippers, except the United States. In other words, that the master and owners of the schooner have a right to retain all the goods of such shippers until their proper share of contribution towards the general average is either paid or satisfactorily secured to be paid. . . . The question then is, whether a like lien exists in regard to goods belonging to

English case just above referred to,¹ provisions put on board by the government, and belonging to them, were held not to contribute.

the United States. No case has been cited in which any exception has ever been made in regard to the United States, nor has any authority been produced to show that it constitutes a known prerogative of any other government or sovereignty. I have examined the treatises upon the prerogatives of the crown of England, and I do not find there, or in any of the great abridgments of the law under the title prerogative, any such exception recognized or even alluded to. The argument rests the objection upon the ground of public inconvenience, if it should be held that, whenever a lien exists against a private person, it is to be held that the like lien attaches against the United States. And it is said that in cases of contract for labor and services, or repairs, or supplies with the United States, no lien can be presumed to exist; but that the only remedy is an appeal, not to law, but to the justice of the government. . . . The present case is not one arising under contract, but by operation of law, and, if I may so say, *in invitum*. It is a case of general average where, as in a case of salvage, the right of the party arises from sacrifices made for the common benefit, or labor and services performed for the common safety. Under such circumstances the general maritime law enforces a contribution, independent of any notion of contract, upon the ground of justice and equity, according to the maxim, *qui sentit commodum, sentire debet et onus*. And it gives a lien *in rem* for the contribution, not as the only remedy, but as in many cases the best remedy, and in some

cases the only remedy; as, for example, where the owner of the goods is unknown. Indeed, it may be asserted with entire confidence, that, in a great variety of cases, without such a lien, the ship-owner would be without any adequate redress, and would encounter most perilous responsibility. . . . It is said that, in cases where the United States are a party, no remedy by suit lies against them for the contribution; and hence the conclusion is deduced that there can be no remedy *in rem*. Now, I confess that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States in its sovereign capacity would seem to furnish the strongest ground why the remedy *in rem* should be held to exist. And I do not well see how otherwise it would be practicable at all, or, if practicable, how without extreme peril to the ship-owner any private ascertainment or settlement of the general average could be made at all. The United States would not be bound by any such ascertainment or settlement of the average. They might deny the correctness of the valuation and apportionment; there would be no remedy to compel a submission to the authority of any tribunal of justice; and whether the ship-owner should ever receive any compensation or not, and what compensation, would depend upon the good-will of Congress after what is a most lamentable defect in the existing state of things, a protracted appeal, and after many years' duration of unsuccessful and urgent solicitations to that body. And yet the contribution of every other

¹ Brown v. Stapleton, 4 Bing. 119.

But the reasons given for this at much length include no reference to the fact that they were public property. To this extent, therefore, this case must be considered as denying by implication any exemption on that ground.

It is the general rule of all contributory maritime interests, that their contributory value is that which they have at the time and place where they are considered as finally saved.¹ So far as the goods are concerned, this value is ascertainable in many ways. They may be sold at that place, and their net proceeds then determine their contributory value.² If they are not sold, there

shipper may be, and indeed must be, materially dependent upon what is properly due and payable by the United States. In the case of mere private shipments, a court of equity (and probably a court of admiralty also, by a proceeding *in rem*) would have ample jurisdiction to compel a reluctant shipper to submit to its jurisdiction, in ascertaining and decreeing an apportionment of the contribution to be made by all the shippers. I cannot therefore but think that the circumstance that the United States can in no other way be compelled to make a just contribution of its share in the general average, so far from constituting a ground to displace the lien created by the maritime law, does in fact furnish a strong reason for enforcing it. . . . Finding therefore no such exemption from the ordinary lien for general average as the government seeks to sustain justified by any general principle or any authority, I am not bold enough to create one. The consequence is, in my opinion, that the present suit is not maintainable, and that judgment ought to be entered for the defendant."

¹ 2 Arnould, 932; 2 Phillips, § 1401; Bedford Com. Ins. Co. v. Parker, 2 Pick. 1, 11. When the general contribution is for disbursements, the goods ought to contribute according to their

value at the time when the disbursements were made, and without reference to a subsequent deterioration. *Benecké, Pr. of Indem.* 298; *Douglas v. Moody*, 9 Mass. 548, 554.

If the vessel arrives at the home port, or if it is wrecked, and the goods are sent on, the general rule is that they shall contribute according to their value there. *Barnard v. Adams*, 10 How. 270, 307. In this case the court said: "The place where average shall be stated is always dependent more or less on accidental circumstances, affecting not the technical termination of the voyage, but the actual and practical closing of the adventure. We see nothing in the circumstances to take this case out of the general rule that contribution should be assessed on the value at the home port." See also *Gillett v. Ellis*, 11 Ill. 579; *Gray v. Waln*, 2 S. & R. 229.

² See *Stevens & Benecké on Av.* (Phil. ed.) 68-74, 193, 194; 2 Phil. on Ins. § 1401; *Dodge v. Union Mar. Ins. Co.*, 17 Mass. 470, 478; *Tudor v. Macomber*, 14 Pick. 34. In *Lee v. Grinnell*, 5 Duer, 400, 430, where the cargo was damaged while in port and sold, it was held that the amount it brought at the sale was to be taken as the fair value. In *Richardson v. Nourse*, 3 B. & Ald. 237, goods were sold at an

may be a known market value, and upon this is founded their contributory value. In the absence of these tests, the invoice value is the foundation of the estimate, and this invoice value is generally taken for this purpose whenever the average is adjusted at some other port than the port of destination.¹ If this invoice price does not include commissions and premium of insurance, these should be added.²

The two elements which enter into the estimate of the contributory value of goods are, first, only the value saved contributes, and

intermediate port, in order to pay for necessary repairs, at a price higher than they would have brought at the port of destination. A reference being had to settle the loss, the arbitrators (who were mercantile men) allowed for the actual value of the goods when sold, and not for their value at the port of destination. The case came before the court on a motion to set aside the award. It was held that, as it did not clearly appear that the award was contrary to any well-established principle of law, it must stand. Mr. Phillips says: "There is a diversity of opinion on this question among practical underwriters in the United States." *Stevens & Benecké on Av.* (Phil. ed.) 194. We believe that adjusters in this country, where there is a *bona fide* sale of goods, take the net proceeds as determining the contributory value.

¹ *Tudor v. Macomber*, 14 Pick. 34, 38. If the policy should contain a less valuation than the invoice, it should be opened, just as it would be in respect to the ship, to ascertain the true or invoice value. *Ibid.*

An average loss opens a valued policy. *Le Cras v. Hughes*, 3 Doug. 81.

Where goods insured by a valued policy are jettisoned for the common benefit, the underwriters are liable for the amount at which the goods are valued in the policy, although it exceed

their market value at the place of destination. *Forbes v. Manufacturers' Ins. Co.*, 1 Gray, 371.

In New York the value of the goods is taken to be the first cost at the port of departure and charges. *Leavenworth v. Delafield*, 1 Caines, 573. In this case Judge *Livingston* said: "It will be a rule less liable to objection, will suit the greatest number of cases, and not be affected by the fluctuations of markets or other contingencies, and certainly most easy of practice, always to value the goods at the invoice price, that is, at their first cost, without regard to their price abroad."

See also *Mutual Safety Ins. Co. v. Cargo of Ship George, Olcott, Adm.* 157, 166.

In *Spafford v. Dodge*, 14 Mass. 66, it was held that the value of the goods at the port of lading was to be taken, unless it should appear that the value was increased by being carried to the port where the average expense became necessary.

² In case of an open policy the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for ascertaining the value of the goods. *Usher v. Noble*, 12 East, 639.

next, only so much of that value as was at risk at the time of the sacrifice. Hence, as we have seen in relation to freight, whatever charges, losses, or expenses occur subsequently to the sacrifice, in reference to the goods saved, before it is finally saved, diminish its value just so much. Therefore from the proceeds, if sold, freight, duties, and commissions, and all other expenses necessary to realize the value of the goods, are deducted.¹

The sending of goods to a port is always with the belief that the increase of value by carriage there will more than meet the expenses of freight and carriage. In practice it is often assumed, neither party objecting as he has the right to, that these expenses meet this increased value and no more. Then the value of the goods remains the same as their original value, which is determined by the invoice, and hence the invoice price is taken as their contributory value.²

¹ *Benecké, Pr. of Indem.* 301; *Dodge v. Union Mar. Ins. Co.*, 17 Mass. 470, 478.

² In *Douglas v. Moody*, 9 Mass. 548, a neutral hired and loaded a vessel for a voyage, in the course of which she was captured on suspicion of having enemies' property on board, and carried into port and libelled as prize; but before any proceedings in the admiralty a compromise was effected between the captors and the hirer, who was owner of the cargo; on which, for the release of the vessel and cargo, the latter drew a bill of exchange, which the master indorsed, he having been appointed by the owners of the vessel; and in consideration thereof the vessel and cargo were released, and arrived in safety. It was held that, on payment of the bill of exchange, the owners were liable therefor to the hirer, as for an average on the value of the vessel and cargo at the time and place of incurring the expense. In regard to the adjustment, the court said: "The question, as it occurred at the trial in assessing the damages, supposing the plaintiff entitled

to recover, respects more particularly the hire and freight. The same sum is freight as connected with the cargo, and hire as money due to the defendants. If the value of the cargo is to be increased by adding to it this sum as freight saved by its arrival at the place of destination, and its increased value in the market there, there seems to be an equal reason for adding it as hire to the value of the vessel; because the hire becomes due to the owners of the vessel in consequence of her arrival. It may be said that the hire is subject to great deductions for wages and provisions, and is not a net gain or acquisition to the defendants. But the addition of a freight to the value of the cargo may be liable to similar objections. And it seems, upon the whole, to be most reasonable, and most consonant to the rules of contribution as observed in English decisions, to estimate the vessel and cargo at their value in the place and at the time where and when the expense was incurred, which is to be adjusted by the respective owners according to their average proportions."

We see no sufficient reason for saying, with Mr. Benecké¹ that freight advanced by the shipper should be included in the contributory value of his goods, when the adjustment is made at the port of departure. It is only an unusual stipulation as to the time of the payment of freight, and we know not why it should affect the rights or obligations of the parties as to contribution, especially where the freight is to be recovered back, if not subsequently earned, as must usually be the case.² In one American case there seems to be an exception to the rule that goods are not liable to contribution unless they are at risk when the sacrifice is made. The peculiar circumstances of this case may justify the decision.³

¹ Stevens and Benecké on Av. (Phil. ed.) 257.

² In *Winter v. Haldiman*, 2 B. & Ad. 649, it was held that even such an advance did not constitute a part of the amount of insurable interest in the adjustment of a total loss. 2 Phil. on Ins. § 1404.

³ *Bevan v. Bank of the United States*, 4 Whart. 301. In this case a quantity of specie, the property of the defendants, was shipped, together with other goods, on a voyage from New Orleans to Philadelphia. The vessel became ice-bound in Delaware Bay, and was in imminent danger of being wrecked. The specie was taken out, and conveyed by land to Philadelphia, where it was delivered to the defendants on payment of freight. Eight weeks afterwards the vessel arrived in safety with the remainder of her cargo, which had been in whole or in part discharged into lighters, and afterwards reshipped. A number of additional charges had also been incurred in the mean time for the safety of the ship and cargo. It was held that the defendants were bound to pay their proportion of these expenses. The grounds of this decision appear from the following extracts from the opinion of the court: "Suppose, for example, that a vessel, with a cargo

of the same kind of goods throughout on board, belonging to twenty different owners, each owning an equal quantity, is run on shore within eight or nine miles of the port of destination, for the purpose of saving her and her cargo from an impending danger, when it becomes requisite to unlade the vessel, and to convey the cargo thence by wagons to the place of delivery, in doing of which two months are consumed, it is obvious that, according to the principle contended for on behalf of the defendants, the owner whose goods are first taken out of the vessel and conveyed immediately to him will have comparatively but little of the whole expense to pay, whereas he who receives his goods last will have perhaps more than twenty times as much to pay as the first. The charges being made general average as to the first who receives his goods down to the time of their being delivered to him, the last has to pay one-twentieth part of these charges, and upon the same principle one nineteenth of the expenses attending the saving and delivery of the goods to the second, and so on till his own turn comes, when he has to pay all the expenses of saving his own portion of the cargo. . . . This rule would subject those whose goods are saved

We cannot doubt, however, that the rule itself is, very nearly at least, universal.

Where a cargo was saved in part at its own expense, and the insurers on the ship expended a large sum to get the ship off, and the ship was saved and brought to the wharf the remaining cargo, it was held that the cargo saved by its owner should contribute nothing towards the expenses of the insurers, but that the cargo brought in by the ship should contribute.¹

and delivered last to the payment of a portion of the expenses incurred in saving those of the first, without requiring the first to pay any part of the expenses incurred in saving the goods of the last, but leaving them to pay the whole of it themselves. . . . The property of the defendants and that of the plaintiffs formed, as it were, a common stock of a sea venture held by them in their several proportions as partners, and all were alike exposed to the same common danger from which the stock belonging to the defendants was saved, and a proportionable part of the expense incurred by saving it paid by the plaintiffs; and why shall the latter not receive from the former a proportionable part of the expense incurred in saving their portion of the stock from the same common danger? Natural justice seems to require that they should." Benecké maintains the same principle as to goods shipped into barges for the purpose of lightening and saving the vessel and the remaining cargo, but adds that, as to goods taken from the vessel for the convenience and at the peril of their owners, all connection between them and the vessel and remaining cargo ceases from the moment of the unloading, and a subsequent general average falls entirely upon the vessel, the goods remaining on board, and the freight for the same. Benecké, *Pr. of Indem.* 306, 307.

¹ *Bedford Com. Ins. Co. v. Parker*, 2 Pick. 1, *supra*, p. 263, n. 1. In giving the opinion of the court in this case, *Parker*, C. J., said: "We think the plaintiffs' claim for contribution on that part of the cargo which had been taken from the vessel, at the expense of the defendants, before the contract was made under which the vessel was raised and brought into harbor, as untenable as the defendants' position, that the part which remained on board should not be held to contribute. . . . It cannot be said that the iron taken from the vessel by the owners, before the contract was made under which the vessel was saved, was saved by means of the successful execution of the contract. It might with more fitness be said, that relieving the vessel from so great a proportion of the weight of her cargo was an efficient cause of her final rescue, and for this reason the expense of saving this iron should be made a subject of average; but this was not done with a view to save the ship, but was an independent act of the owners of the iron, and must therefore bear its own expense. . . . It is said that great disorder and confusion, and perhaps increased danger, will be the consequence of allowing every freighter of goods, when a vessel is stranded, to hurry off their particular goods, which may be easily come at; and that it would be throwing an undue burden upon the owners of those goods

Insurers of ship, freight, or cargo are not affected by the estimated contributory value of it, in reference to their liability on the property. But if insurers are called to indemnify the insured for his contribution, they pay the same proportion of the contribution which they insure on the value of the goods.¹

It may be well to remark here, that in reference to this last question, as well as many others which relate to the contributory interests and adjustments thereof, important distinctions are to be taken between insurance on valued policies and insurance on open policies. We prefer to consider this subject, however, in our chapter on Valued Policies.

SECTION IX. — A. *Of the Force and Effect of an Adjustment.*

THE policies of this country usually provide that the sum insured is payable in a certain number of days "after the proof and adjustment of the loss." This provision would seem to make an adjustment necessary for recovery; it is, however, quite certain that, if the insurers refuse to pay or dispute the claim, this clause becomes so far inoperative that the mere want of an adjustment will neither prevent nor delay trial, judgment, or execution. Still the usage of making an adjustment is so general, if not universal, that it may be considered practically necessary. Where, however, the claim of the insured is for a total loss, no such adjustment as would be made for a partial loss need be presented.²

which may be so situated that the owners cannot rescue them. No such difficulty happened in this case; on the contrary, what was done by the owners of the cargo facilitated the final saving of the ship. Where a contrary effect would result from such an act, the legal consequence may be different, for it peculiarly belongs to contracts of this nature that apparently slight differences of facts may have an important bearing on questions relating to them. Had another person been the owner of the iron remaining on board the vessel, being in the bottom

of the hold, and therefore very difficult to be taken out, he would have no just ground of complaint against the defendants for removing so much of the cargo as enabled the underwriters on the ship to raise her, and thus to save his iron, which might otherwise have been lost."

¹ The rate of loss being ascertained, the insurer is liable in the proportion which the sum insured bears to the actual value of the property included in the risk described in the policy. *Clark v. United M. & F. Ins. Co.*, 7 Mass. 365, 374.

² *Fuller v. Kennebec Mut. Ins. Co.*,

Adjustments are usually made in all of our commercial ports, in a form and manner substantially the same, and in accordance with similar principles everywhere. But there is no particular form of adjustment established by law or usage. These instruments are sometimes very brief and simple, but they are of great importance, for the law of insurance makes them in most cases binding upon the parties.

In one English case,¹ Lee, C. J., said that he considered an adjustment, when signed by the underwriter, as equivalent to a note of hand, and that no further proof of the loss was necessary. In England, the business of insurance, if we can judge by the books, seems to be transacted even more generally through insurance brokers than in this country. There, too, the practice of insurance, by different underwriters on the same policy, still continues, while it has nearly ceased in this country. There the broker makes, or causes to be made, an adjustment, and then indorses on the policy, "Adjusted the loss on this policy at £— per cent." He then takes the policy to the different underwriters, who sign their initials to the indorsement.² The signature of the underwriter to the policy is sometimes struck out, his initials to the indorsement of adjustment binding him as to an ascertained loss; and he would be bound, if his signature to the policy were struck out, and the adjustment written on the blank space opposite his name, and his initials affixed to it.³

The adjustment verified as above, or in any similar way, becomes a contract, and subject to the general law of contracts. If it be tainted with fraud, it has no force or effect whatever against the party defrauded; as, for example, it is not binding if it were made upon the evidence of fictitious invoices and bills of lading.⁴ Neither is it if it were made upon a misrepresentation or a concealment of a material fact. Here the question, what

31 Me. 325, 328. The plaintiff must establish his right to recover, as in other cases, by evidence, and this he might do with or without an adjustment. Ibid.

¹ *Hog v. Gouldney*, Beawes, *Lex Mercatoria*, 310, Park, Ins. 162, decided in 1745. See also *Hewit v. Flexney*

(1746), Beawes, *Lex Mercatoria*, 308; *Adams v. Saundars*, 4 C. & P. 25; *May v. Christie*, Holt, N. P. 67.

² 2 Arnould on Ins. 1201.

³ *Adams v. Saundars*, 4 C. & P. 25.

⁴ *Haigh v. De la Cour*, 3 Campb.

319.

is material, or what is misrepresentation or concealment, is much the same as when it arises respecting the validity of the policy. Thus where the property had been captured, but a large portion saved, and the assured did not inform the adjuster that it had been saved, the court held the adjustment not binding.¹

A difficulty sometimes occurs, if the question be one of concealment, whether the insured had sufficient means of knowledge; for if their ignorance were their own fault, they can found upon it no defence against the effect of the concealment. So if the insurers had means of knowledge, they cannot make their ignorance the ground of a defence against the adjustment. Thus it has been held, where an underwriter, before accepting the adjustment, has papers before him stating all material facts, he cannot afterwards set the adjustment aside on the ground that he read the papers in a cursory manner.²

It is a general principle of the law of contracts, that where a party makes a promise, under a mistake of law, he may set up this mistake in defence of an action founded on the promise.³ The ground of this rule is, that the promise is given without consideration.⁴ This principle has been applied to adjustments.⁵ So if the adjustment were made under a material mistake of the facts of the case, it would have no force against either party.⁶

¹ *Faugier v. Hallett*, 2 Johns. Ca. 233.

² *Voller v. Griffiths*, before Lord Kenyon, C. J., Selw. N. P. 985.

³ *Warder v. Tucker*, 7 Mass. 449; *Freeman v. Boynton*, 7 Mass. 483; *May v. Coffin*, 4 Mass. 347; *Blesard v. Hirst*, 5 Burr. 2670; *Goodall v. Dolley*, 1 Term, 712.

⁴ *Cabot v. Haskins*, 3 Pick. 83.

⁵ *Rogers v. Maylor*, *Sittings after Trin.* 1790, reported in *Park on Ins.* (8th ed.) 267. This was an action on a policy of insurance on ship and goods. The policy had been adjusted by the defendant at £ 50 per cent, and it was contended that he was now bound by that adjustment. On the other hand, it was argued that the adjustment was not

binding, and that, if it were, it ought to have been declared on specially. Lord Kenyon said that he did not think it necessary to declare on the adjustment specially, that it was *prima facie* evidence against the defendant; but if there had been any misconception of the law or fact upon which it had been made, the underwriter was not absolutely concluded by it.

⁶ *Rogers v. Maylor*, *supra*; *Christian v. Coombe*, 2 Esp. 489. In *De Garron v. Galbraith* (1795), *Park, Ins.* 267 (8th ed.), the plaintiff produced the adjustment and rested his case. The witness who produced it testified that, soon after the underwriters signed, doubts arose as to the honesty of the transaction, and they refused to pay. Lord

Here, again, the question may arise whether the mistake was the party's own fault. Thus, if we suppose a deviation had occurred which would have discharged the insurers; they had of course a right to waive this defence, and if with full knowledge of the fact they signed the adjustment, they would be bound by this waiver. It seems to be held, however, in a case in which this question arose, that it was not enough to bind the underwriters, that facts had been disclosed to them from which deviation might have been inferred, unless their attention had been particularly drawn to them, or the facts were such as to make the inference obvious and necessary.¹

Kenyon, C. J., held that, under these circumstances, the plaintiff must go into other evidence, and as he was not prepared to do so, he was nonsuited. In *Herbert v. Champion*, 1 Campb. 134, the defence was, that a letter from the captain, dated December 5th, stating that he was to sail under convoy, though received on the 6th of that month, had not been communicated to the underwriter before effecting the policy, and that this was a concealment of a material fact. To this it was answered that the defendant, on the 12th of March following, after reading the letter in question, together with others from which he had obtained a full account of all the circumstances of the case, had adjusted the policy as for a total loss, and put his initials on the back of it; and, secondly, that the letter was not material to be communicated. It was held that the underwriter, by thus signing his initials to the adjustment, was not precluded afterwards from taking advantage of circumstances with which he had been made acquainted before signing the adjustment. Lord *Ellenborough*, C. J., said: "The cases are clearly distinguishable, where, upon a dispute, the money is paid, and where there is only a promise to pay. If the money has been paid, it cannot be recovered back without proof

of fraud; but a promise to pay will not, in general, be binding, unless founded on a previous liability. What is an adjustment? An admission, on the supposition of the truth of certain facts stated, that the insured are entitled to recover on the policy. . . . Here it is a mere admission, and there was no consideration for the promise it is supposed to prove." In *Sheriff v. Potts*, 5 Esp. 96, the adjustment was admitted, but the defendant's counsel stated that his defence turned upon a fact admitted by the plaintiff himself in his answer in equity, namely, that there had been a deviation. This deviation being proved, the plaintiff was nonsuited.

¹ *Shepherd v. Chewter*, 1 Campb. 274. This was an action upon a policy of insurance on goods on board a ship at and from Liverpool to Trieste or Venice, with or without letters of marque. The loss was by capture. The plaintiff gave in evidence an adjustment on the policy signed by the defendant, and proved that, previously to its being signed, an account had been posted up at Lloyd's, which the defendant must have seen, that the vessel had chased everything she saw, and had been at last captured through the cowardice of the master. The underwriter said, when he signed the adjustment, that it was not

In an early American case the courts say: "It appears that, previous to the adjustment, all the facts were communicated to the underwriters. The adjustment was made by the underwriters with their eyes open. An adjustment cannot be opened, except on ground either of fraud, or mistake from facts not known."¹ Nevertheless a new trial was granted, on the ground that the vessel had sailed with an insufficient crew, and therefore it was unseaworthy. The case is obscurely reported, and it is not certain that the facts in possession of the insurers, when they agreed to the adjustment, included this insufficiency.

We cannot doubt that the general rule is, as we have stated, in this country, and an adjustment made in good faith, and a full knowledge of all the material facts of the case, is binding upon the parties. It may be, however, doubted whether it is not otherwise in England. Lord Campbell, in a note in his reports,² discusses the question at some length, and expresses a decided opinion that an adjustment agreed to with a full knowledge of material facts, which would have afforded the insurer a defence under an action against the policy, does not preclude him from afterwards setting up this fact in defence. He goes upon the ground that an adjustment is only a promise to pay; that this promise cannot be enforced unless it rests on a consideration; and

likely that the ship was lost by cowardice, as the master had been killed. The defendant proved that the ship had been in the constant habit of cruising, which amounted to a deviation. It was contended for the plaintiffs that the only defence which could be set up was, that some fraudulent concealment had been practised, but that notice that the vessel had chased everything informed him of the deviation. Lord *Ellenborough* said that the adjustment was *prima facie* evidence against the defendant, but that it certainly did not bind him, unless there was a full disclosure of the circumstances of the case. Therefore, if it should be thought that the defendant, by reading the notice at Lloyd's, had his attention drawn only to the

manner in which the ship was captured, and was not roused to the previous deviation with which he afterwards became acquainted, his liability would be discharged, notwithstanding the adjustment. His remark when he signed the adjustment seemed to show, that he had then only considered the conduct of the master at the moment of the capture; and the expression of the ship having chased everything did not of necessity imply a deviation, since from carrying a letter of marque she might be considered as at liberty to chase, so that she continued in the direct line of the voyage.

¹ *Dow v. Smith*, 1 Caines, 32.

² *Shepherd v. Chewter*, 1 Campb. 274, 276.

although the adjustment may, as between the parties, import a consideration, yet, if the insurer denies the consideration, he may, by proof of its absence, avoid his promise. In other words, he allows to an adjustment no other effect than merely to transfer the burden of proof from the assured to the insurer. It cannot be denied that high authorities — Lord Ellenborough, for example — assert the same principle.¹ And there are decisions which support it.² But even in these there seems to be a reluctance to apply this principle freely. Even Lord Ellenborough says, “An underwriter must make a strong case after admitting his liability.”³ We cannot understand this. An adjustment agreed upon is either a contract which binds both parties, unless it can be set aside for fraud, or mistake of law or fact, which we take to be the law in this country; or else it is, what Arnould supposes it to be,

¹ *Herbert v. Champion*, 1 Campb. 134, 136. This was an action on a policy upon a ship which was captured by a privateer. The defence was that a letter from the captain, stating that he was to sail under convoy, though received more than a month previous, had not been communicated to the underwriter before effecting the policy; which letter, it was contended, would have induced the insurers to make inquiries whether the ship had reached her destination, and would have shown her to be missing. To this it was replied that the defendant, after reading the letter in question, together with several others subsequently written by the captain giving a full account of all the circumstances of the case, had adjusted the policy as for a total loss, and put his initials upon the back of it, which was considered equivalent to an order for the money. The materiality of the letter in question was also denied. Lord *Ellenborough* in his opinion uses the following language: “The cases are clearly distinguishable where, upon a dispute, the money is paid, and where there is only a promise to pay. If the

money has been paid, it cannot be recovered back without proof of fraud; but a promise to pay will not in general be binding, unless founded on a previous liability. What is an adjustment? An admission, on the supposition of the truth of certain facts stated, that the assured are entitled to recover on the policy. Perhaps, if properly stamped, it might be declared on as a promissory instrument. Here it is a mere admission, and there was no consideration for the promise it is supposed to prove. An underwriter must make a strong case after admitting his liability; but until he has paid the money he is at liberty to avail himself of any defence which the facts or the law of the case will furnish.”

² Lord *Campbell* cites in support of the principle which he maintains, and which is referred to in the text, *Rann v. Hughes*, 7 T. R. 350, n.; 3 Bos. & Pull. 249 (a); *Plowd.* 305, 308; *Mamott v. Hampton*, 7 T. R. 269; *Bilbie v. Lumley*, 2 East, 469; *Fisher v. Lamuda*, 1 Campb. 190.

³ *Herbert v. Champion*, 1 Campb. 134, 137.

“as the fair result of the authorities, nothing more than a promise to pay, which is only binding when founded on the consideration of previous liability.”¹

If it be only this, when the insurer is called upon to perform his promise, he may prove that it was voluntary only, and not founded on any consideration, as freely and fully as he could do so in any other case where this question arises. And this defence if made out would be as effectual. We are not satisfied by the cases to which Mr. Arnould refers, or any others that we have been able to find, that an agreed adjustment in England is so entirely devoid of final authority. We believe that the interests of commerce, and the purposes and principles of the law of insurance, require that such an adjustment should be held to be conclusive against both parties, with only the exceptions above stated, of fraud or mistake.

One important distinction is taken between a mistake of law and a mistake of fact, namely, that if money be paid by insurers under a mistake of law they cannot on this ground recover it back;² while, if the money were paid under a mistake of fact, it may be recovered back.³ On this ground it has been held in England, that where money was paid upon a policy, under a knowledge that it was discharged, but in forgetfulness of the fact, the money could be recovered back on the ground that “the knowledge of the facts which disentitles the party from recovering must mean a knowledge existing in the mind at the time of payment.”⁴ This

¹ 2 Arnould on Ins. 1202.

⁴ Kelly v. Solari, 9 M. & W. 54.

² Bilbie v. Lumley, 2 East, 469; Lowry v. Bourdieu, 2 Doug. 468. In the former case Lord *Ellenborough* said: “Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.” And in the latter case, where money paid under a mistake of law was sought to be recovered back, it was observed by *Buller, J.*, that, “if the law was mistaken, the rule applies that *ignorantia juris non excusat*.”

³ Reyner v. Hall, 4 Taunt. 725.

Here the insured on a life policy omitted to pay the quarterly premium, and the policy thereby became of no effect, and the word “lapsed” was written on the policy by one of the directors. The insured died, and two of the directors who had known of the fact of the policy having lapsed, together with another director, on application being made, drew a check for the amount. The mistake being discovered, the insurers brought an action to recover back the amount, on the ground that it was paid under a mistake of fact, and the two directors testified that

was a life policy ; but we know no reason why, if the principle be sound, it should not apply as well to marine policies. We have much doubt, however, as to its soundness, and Lord Abinger, at the trial, ruled otherwise.

An adjustment may be conditional in its terms ; and if it be so the party relying upon it must prove that the conditions were performed.¹ And on this point it has been held, with some contra-

they had entirely forgotten at the time of paying the money that the policy had lapsed. Lord Abinger, C. B., at *nisi prius*, expressed his opinion that if the directors had had knowledge, or the means of knowledge, of the policy having lapsed, the plaintiff could not recover, and that their afterwards forgetting it would make no difference. But afterwards, at the trial in the Exchequer, he said, in regard to his previous ruling : " I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them." He then states the qualification of the rule which is quoted in the text. Baron Parke also said : " If, indeed, the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it ; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact."

¹ Gammon v. Beverley, 1 J. B. Moore, 563 ; S. C. 8 Taunt. 119. This was an action on a policy of insurance to recover a salvage loss. The facts

were as follows. The defendant, with several other underwriters, in August, 1814, subscribed a policy on hides from Buenos Ayres to London. The ship was captured, and the plaintiffs abandoned the cargo to the underwriters, and claimed a total loss. Some time after the ship was recaptured, and all the underwriters but the defendant, on the 19th of October, 1814, adjusted a salvage loss, deducting short interest to the amount of £64 18s. 3d. per cent, which they paid. The defendant, on the 7th of February, 1815, " adjusted £33 per cent on account of his subscription to the policy, until the account of the goods insured could be made up, when a final loss was to be paid to the same amount as by the other underwriters ; and if the same exceeded £33 per cent, the defendant was to pay the excess ; if short, the insured was to return the difference." It was held that this was a conditional and not an absolute adjustment ; and that, as the plaintiffs had not proved that the account of the goods insured had been made up, they were not entitled to recover, and that the defendant was not bound by the former adjustment of the other underwriters. The court said : " There can be no doubt but that, in the case of an absolute adjustment, an underwriter is liable to pay the amount of the indemnity which the assured is entitled to receive under the policy, which amount is to be explained by

diction to the law of evidence, that, where the adjustment is on its face absolute, the insurers may attach to it a condition by parol evidence.¹

An adjustment, and a settlement under it, will leave to the insured the adjustment. It has been objected that the plaintiffs have not adduced evidence to prove the defendant's liability to pay; if the memorandum indorsed on the policy and signed by him was absolute, he would have been liable. The question then is, whether, either on the face or by the terms of this instrument, it is an absolute or conditional adjustment; if it be conditional, the terms it contains are in the nature of a condition precedent, and should therefore have been complied with by the plaintiffs in order to entitle them to recover. Neither in terms nor substance can this be an absolute adjustment. If the memorandum had been 'adjusted £33 per cent on account upon the defendant's subscription to the policy,' it would have amounted to an absolute adjustment; but the subsequent terms have a prospective view, namely, 'until the account of the goods insured can be made up.' The word 'until' is clearly prospective, and 'can' is equally so. On the face of the memorandum, therefore, the undertaking of the defendant appears to be prospective, and that his subsequent liability depended on the making up of the account; but it is not merely prospective in this respect, but goes still further; for when the account was made up, a final loss was to be paid to the same amount as by the other underwriters; and if the same exceeded £33 per cent, the defendant was to pay the excess; if short, the insured was to return the difference. Throughout, therefore, it was entirely prospective, and showed that something remained to be done; and more particularly so as all the other underwriters had adjusted and paid their losses long before. If therefore the defendant was to be bound by what the other underwriters had done, there would have been no necessity for an account to have been made up, for they had excluded themselves from having an account rendered to them by the terms of their adjustment of the 19th of October, 1814. As therefore the defendant's liability would only attach when the account was made up, and as the adjustment settled by the other underwriters was not conclusive on him, as it was made nearly four months before he signed the memorandum in question; and as his name only remained on the policy, the plaintiffs should have proved that they had made up and rendered to him an account of the proceeds. The undertaking by the defendant to pay the final loss to the same amount as the other underwriters is qualified by the former part of the adjustment, which involved a condition precedent which has not been performed by the plaintiffs."

¹ *Russel v. Dunskey*, 6 J. B. Moore, 233. In this case, by a memorandum of adjustment indorsed on the back of a policy, it was stated that a particular-average loss of £ 54 per cent had been settled between the plaintiff (an underwriter) and defendant. It was held that parol evidence was admissible to show that, by a previous arrangement, it was agreed that, if the other underwriters paid a less sum, the surplus should be repaid.

sured his claim or remedy on the policy, so far as the subject-matter on which the claim rests is not included in the adjustment.¹ It might seem that this should be applied only to such a limited adjustment as was intended to cover only a part of the claims of the insured; and it has been held that where there was an adjustment and a settlement under it, and the policy was given up with no reference to a claim existing at the time against the insured in admiralty, for salvage, and this claim was afterwards decided against the insured, he could not on this ground have any further claim against the insurers.²

An action may be brought upon a written adjustment, or upon the policy, without especially setting up the adjustment.³ This last is the customary way, and an adjustment, if agreed to, may be offered in evidence in an action on the policy.⁴

If the insured presents an adjustment, and the insurers refuse to settle upon it, and the insured brings his action, he is not bound by the adjustment he has presented, but may offer a new one more favorable to himself.⁵

Where the insured presents an adjustment, and offers proof in which there is some formal defect, or some deficiency which he may supply or remedy, the insurers are bound to point out this error or defect to him, that he may have an opportunity to amend it. And their omission to do so will be understood as a waiver of their right to object to his claim on that account. This has been held in actions on a fire policy, and in one action on a marine policy.⁶

¹ Thus, if, the insurers being held to indemnify for certain injuries, a vessel is abandoned to them, and after an apparently complete repair by them is tendered to the insured, and accepted by him, such acceptance will not preclude him from maintaining an action to recover indemnity for any subsequently discovered deficiency in her repairs as a partial loss. *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191.

² *Batre v. Louisiana Ins. Co.*, 13 La. 577. But it was admitted in this case that if the insured had notified the insurers, at the time of the settlement, of

this outstanding claim, a different case would have presented itself.

³ *Rogers v. Maylor*, Park on Ins. (8th ed.) 267.

⁴ *Ibid.*

⁵ *American Ins. Co. v. Griswold*, 14 Wend. 399.

⁶ *Allegre v. Maryland Ins. Co.*, 6 H. & J. 408. This was an action on a policy of insurance on the cargo of a ship from Rio de la Plata to Havana. On the voyage a portion of the cargo was lost by one of the perils insured against. A protest was made in due form, detailing the particulars of the shipment, the

It seldom happens that an adjustment of general average does not include items of partial loss, because the adjustment covers the

sailing, and the loss sustained. This protest, together with the usual bill of lading, was delivered to the defendants by the plaintiff, as his preliminary proofs, before the bringing of the action. After the receipt of this, the company wrote to the plaintiff that they declined paying the insurance. In the court below, the plaintiff prayed the court to instruct the jury that no proof was required on this trial that he exhibited to the defendants, before instituting this suit, any preliminary proofs, or that if such proofs be necessary, the protest and bill of lading are sufficient preliminary proofs, or that the letter from the defendants was a waiver of such proof. The court refused to give this direction, and to this refusal the plaintiff excepted. Upon the point in question, the court said: "Was the letter of the defendants to the plaintiff a waiver of such preliminary proofs? is the last question arising on this exception; and the court are of opinion that it was. Good faith and fair dealing is of the very essence of all contracts of insurance, and should pervade every proceeding under them. If then the insurer, in writing this letter, intended to reject the claim of the insured, merely because the invoice had not been produced, the writing of this letter was a fraud upon the assured, a deception utterly inconsistent with the spirit and meaning of the contract, — a species of conduct which this court will never impute to the underwriters while their acts are susceptible of a different interpretation. If they intended to refuse payment of the loss, because the invoice, a customary part of the preliminary proofs, had not been laid before them, it was their duty so to have informed

the insured; and their failure to do so, and the writing of such a letter, was a waiver of all further preliminary proofs. The letter itself is a plain unequivocal notification to the plaintiff, that his claim for indemnity will not be adjusted by the defendants; and by necessary implication gives him to understand, that all further offers of preliminary proofs would be useless." Where the insured claimed for a total loss of a vessel, and thirty days previous to the commencement of the suit exhibited the protest of the captain to prove the loss, but not the register or other proof of interest, to the underwriters, who made no objection to the proofs, but refused to pay, solely on the ground of a deviation, it was held that this was an admission of the plaintiff's interest, or, at least, a waiver of the necessity of producing proof of it. *Vos v. Robinson*, 9 Johns. 192. In *Francis v. Ocean Ins. Co.*, 6 Cow. 404, 415, where, as in *Vos v. Robinson*, the question was upon a marine policy and one of the objections made by the defendants was as to the proof of interest, the court said: "The defendants waived whatever imperfection there may have been in the preliminary proofs of the plaintiff's interest in the subject insured, by not putting their refusal to pay upon that ground. They declared, 'that they would not settle the claim in any way,' putting their objection to pay on the merits of the case, and not on any defect in the proof of the plaintiff's interest. If that ground had been taken, the defect might, and undoubtedly would, have been supplied. But this point was not much insisted upon by the defendants' counsel; and is clearly capable of being supported."

whole loss. Of course the adjuster will carefully discriminate these, and apportion them upon the interest or interests to which they belong. The necessity and the custom of doing this has probably helped to make the phrase "particular average" synonymous or nearly so with "partial loss."

Judgment was given for the plaintiff. This decision was made in the Supreme Court of New York. The defendants took the case on appeal to the Court of Errors. At the trial there, reported in 2 Wendell, 64, 66, the Chancellor said: "In the documents exhibited as preliminary proofs, the interest of Basil Francis was distinctly stated. The insurers made no objection that there was not sufficient proof of interest, but put their refusal to pay on the ground that they were not liable for the loss. That was a waiver of any further preliminary proof of the interest of the assured, and brings this case directly within the decision of the Supreme Court in *Vos v. Robinson*." In *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385, 401, the court said: "The certificate of the magistrate was a part of the preliminary proofs as to the nature, circumstances, and extent of the loss which, by the express terms of the policy, the underwriters had the right to insist upon before any action could be sustained for such loss; but the production of this document, as well as any other part of the preliminary proofs of loss and interest, might be waived by the company. The law is well settled in this State, that if there is a formal defect in the preliminary proofs, required by the policy or the custom of the place, and which could probably have been supplied, had any objection been made by the underwriters to the payment of the loss on that ground, if the insurers do not call for the document or make an objection on the ground of its absence or imperfection, but put their refusal to pay distinctly on

some other ground, the production of such further preliminary proof will be considered as waived." In *McMasters v. West'r Mut. Ins. Co.*, 25 Wend. 379, 382, *Nelson, C. J.*, said: "I think the judge was right, also, in submitting to the jury, whether the company were not concluded from taking exceptions to the preliminary proofs. Although repeated communications had taken place with the officers and agents of the company, and in some instances, in pursuance of directions from the board, after the preliminary proofs were delivered, no such ground was taken. On the contrary, the fair inference from all the proof in the case is, that other grounds were put forth and mainly relied upon to defeat the recovery. The law is well settled, that if there be a formal defect in the preliminary proofs, which could have been supplied had an objection been made by the underwriters to payment on that ground, if they do not call for a document, for instance, or make objection on the ground of its absence or imperfection, but put their refusal upon other grounds, the production of such further preliminary proofs will be considered as waived." But there is no ground for the implication of a waiver of preliminary proof, where the assured could not have supplied the proof, or removed the objection to the want of it, if the objection had been made. The assured, in such case, can sustain no injury by non-disclosure. He is not lulled into false security, nor prejudiced in the way of fraud or surprise. *Edwards v. Baltimore F. Ins. Co.*, 3 Gill, 176.

We have already seen that expenses may be incurred for the benefit of one interest only, and should then be charged to that interest; or for the benefit of more than one, and should be charged accordingly. So they may be incurred for the benefit of all the interests, and will then be chargeable to all, and will be distributable among them all in the same manner, or in the same proportions, as if they were general-average expenses. Whether the adjuster called them in this case general-average charges or not, would be unimportant, so far as the owners and shippers were concerned. But it might be important for the insurers, as the policy might make them liable only for general-average charges, or might exclude that liability. It would be giving quite too much force to an adjustment to say that the name given to these charges by an adjuster could affect the rights or obligations of the insurers or insured, for these must depend upon the actual character of the charges.

B. *Of a Foreign Adjustment.*

The proper place for the making of an adjustment is the home port, or the port of final destination.¹ It is, however, obvious that there may be good reasons for making the adjustment at another port. An owner, for example, of cargo lost by jettison has at once a lien on all the contributory interests and property for his indemnity.² If the ship now makes a port at which it delivers a part of the contributory cargo, and then goes to another port to deliver another part, and the shipper having a claim for contribution is obliged to delay adjusting this claim until the ship reaches her port of final destination, he may lose thereby all power of enforcing this claim, or recovering his indemnity. There would be no remedy for this, excepting to make at an earlier port the adjustment as to the parties whose goods were deliverable at that port. It would, however, be very difficult to make a partial adjustment of this kind, and repeat it as often

¹ Stevens & Benecké on Av. (Phil. ed.) 268; Simonds v. White, 2 B. & C. 823; Sherwood v. Ruggles, 2 Sandf. 55; 805, 811; S. C., 4 D. & R. 375, 385; Chamberlain v. Reed, 13 Me. 357; U. Thornton v. U. S. Ins. Co., 3 Fairf. 150, 153.

² Strong v. N. Y. F. Ins. Co., 11 Johns. 323; Sherwood v. Ruggles, 2 Sandf. 55; 805, 811; S. C., 4 D. & R. 375, 385; Chamberlain v. Reed, 13 Me. 357; U. S. v. Wilder, 3 Sumner, 308.

as it is necessary, and then at the port of final destination make a final adjustment. Hence it is a perfectly well-established rule of the law-merchant, that a foreign adjustment, made at any port at which it ought for sufficient reason to be made, is binding upon all the parties to it. This indeed should be regarded as in one sense a port of destination, for it is so for the goods which are to be delivered there.

The practical rule may be stated thus: the adjustment may be delayed as long as all the contributory interests continue together, and should be delayed until the vessel reaches her port of final destination, if they are to continue together so long. But if these interests are to be separated, then the adjustment should be made at the place where the separation first takes place.¹

We repeat that we consider the rule well established, that an adjustment made at such a port is binding on all the parties; although there are cases, both in England and in this country, which deny its obligation. In our notes we exhibit the authorities on both sides of this question.²

¹ In *Loring v. Neptune, Ins. Co.*, 20 Pick. 411, 413, *Shaw, C. J.*, alludes incidentally to this rule as follows: "The general average in the present case was made up and adjusted at Hamburg, the port of destination, at which the several interests liable to contribute were necessarily to be separated from each other. Hamburg, therefore, was the proper place for the adjustment and payment of this general average."

² In *Power v. Whitmore*, 4 M. & S. 141, an adjustment was made at Lisbon, and wages and provisions were included, which was contrary to the law of England. It was held that the contract was to be construed according to the laws of England, unless the parties were understood as having contracted on the footing of a different known general usage in the country where the adventure was to terminate. There being no evidence of such usage except the decree of the court, the plaintiff was

nonsuited. In *Lenox v. United Ins. Co.*, 3 Johns. Ca. 178, a cargo of pipe staves was insured. Some of them were carried in the hold, and others on deck, with the consent of the insurers. The part on deck was jettisoned, and, according to an adjustment made at Lisbon, the cargo in the hold was charged with its proportion of the loss. It was held that the underwriters were not liable for a general-average loss; for, although it was decided differently at Lisbon, the port of destination, and the law there was stated to be otherwise, the parties to the contract were to be considered as having in view the law of the State in which it was made, and were to be governed by it. In *Shiff v. Louisiana State Insurance Co.*, 6 Mart. La. N. S. 629, where a loss by carrying a press of sail to keep off a lee shore was contributed for in general average in Hamburg, it was held that the underwriters were not liable; because, when

Whatever uncertainty attends this question arises from still another rule, which is, that, wherever an adjustment be made,

they agreed to become responsible to the plaintiff for general average, they understood what was known to the laws of their own country as such, — parties always being presumed to contract in relation to their own laws, unless the contrary is clearly shown; and that they were not responsible in the instance in question, as by those laws the injury sustained was one of particular average.

In the following cases the rule laid down in the text, that a foreign adjustment is binding upon the parties, is substantiated. *Walpole v. Ewer*, Sitt. after Trin. 1789, reported in Park on Ins. (8th ed.) 898, was an action on a policy of insurance upon a respondentia bond on ship and goods, at and from B to C. The ship was Danish; and an average loss had been sustained, towards which the plaintiff, as holder of a respondentia bond, had been called upon to contribute. For the amount of this contribution the action was brought against the English underwriters. Lord Kenyon, C. J., said: "By the law of England, a lender upon respondentia is not liable to average losses, but is entitled to receive the whole sum advanced, provided ship and cargo arrive at the port of destination. The plaintiff contends that, as by the law of Denmark such lenders upon respondentia are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The Danish consul has proved that he received a judgment of the court of Copenhagen, the decretal part of which proves the law of Denmark to be as the plaintiff has stated it. The opinions of several men of eminence in

that country have been offered on each side; but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight than the opinions of advocates, however eminent, or even than the extra-judicial opinions of the most able judges. It seems as if, in this case, the underwriters were bound by the law of the country to which the contract relates." In *Newman v. Cazalet*, Sittings at Guildhall after Hilary, Park, on Ins. 899, the policy on which the action was brought was upon a cargo of fish from Newfoundland to any port of Spain, Portugal, or Italy. The ship met with bad weather, and put into Alicant and Leghorn to repair. The captain, being owner, presented a petition to the commercial court of Pisa to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course, adjusted the loss by charging the cargo at its full value, but the ship only at one half, and the freight at one third; and they also charged as a part of the general average the seamen's wages and provisions while in port. The defendant, as underwriter, had paid into court as much as would cover the average, if adjusted according to the memorandum in the policy and the law and usage of England. The question was, whether, the plaintiff having been compelled to pay beyond that sum according to the calculation of the sentence of the court of Pisa, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard. Mr. Justice Buller said: "On the general law the plaintiff would fail; but in all matters of trade

it must be made under the principles, practice, and law which in that place regulate adjustment. Now these may be quite different

usage is a sacred thing. I do not like these foreign settlements of average which make underwriters liable for more than the standard of English law. But if you are satisfied it has been the usage, upon the evidence given, it ought not to be shaken." It was proved by several brokers that, in repeated instances, they had adjusted averages under similar sentences in the court of Pisa, and that the underwriters, though with reluctance, had always paid them. The plaintiff had a verdict accordingly.

In *Strong v. Firem. Ins. Co.*, 11 Johns. 323, a vessel was moored in the port of Lisbon, and, a violent storm arising, it became necessary, for the preservation of the ship and cargo, to cut away most of her rigging and spars, which damages were made the subject of general average at Lisbon. The point in controversy was, whether the defendants were liable to pay the whole amount of the proportion of general average assessed on the cargo according to the adjustment at Lisbon, or only according to the rule adopted in New York. It was held that their liability was determined by the adjustment at Lisbon. The court said: "The general average once being made, and the amount of contribution between the owners of the ship, freight, and cargo ascertained, it appears, at least nothing appears to the contrary, that the underwriters have been held liable for such amount. . . . Indeed, it seems to me that this view of the subject would be conclusive to show that a *bona fide* adjustment and payment of a general average ought to be the measure of damages, as between the merchant and insured; otherwise, an in-

surance would cease to be what it has always been contemplated, — a contract of indemnity. In this case it is distinctly admitted that, as it respects the owners of the cargo and the owners of the vessel, the average was correctly stated, and rightfully paid in Lisbon. That this is a loss for which the insurers are liable is not disputed; and there is no principle more firmly established than that they are bound to return the money which the assured has been obliged to advance in consequence of any peril within the policy, provided it be fairly and honestly paid, and does not exceed the amount of the subscription." After commenting upon the cases of *Walpole v. Ewer*, and *Newman v. Cazale*, the court continues: "I cannot doubt that at this day the underwriters in England are uniformly held responsible for the amount fairly paid under a foreign adjustment of an average loss." The following reference, in the same opinion, to the case of *Lenox v. United Ins. Co.*, which had been previously decided in the same court, although not overruling it, shows that it was not considered as a direct authority in support of the doctrine that a foreign adjustment is not binding upon the insurer: "The question there was, whether the plaintiff should recover a partial loss only, or the amount paid on the adjustment of a general average at Lisbon; and it was decided that he should recover a partial loss only, on the ground that, according to our law, the staves on the deck of the vessel thrown overboard in a storm to lighten her could not be brought into a general average. *What would have been the effect of this adjustment, if the jettison had, according to the laws of*

in different ports. The principal reasons why a foreign adjustment is binding on its owners and shippers may be briefly stated

this country, formed a proper item in the making it up, is left undetermined." In a subsequent case in the same State, *Depau v. Ocean Ins. Co.*, 5 Cow. 68, the court decided the question as to the effect of a foreign adjustment in the same way as in *Strong v. Firemen's Ins. Co.*,—that case being cited as the authority by which it was guided. In accordance with these decisions was that in *Loring v. Neptune Ins. Co.*, 20 Pick. 411. There Chief Justice *Shaw* uses the following language upon the point under consideration: "In general it is to be presumed that both the assured and the underwriter are acquainted with the nature of the business in respect to which they contract; that they are acquainted with the customs and usages of that business, and consent to conform to them, unless there be some stipulation to the contrary. It is well known, therefore, to both parties that the assured may have to pay, in respect to losses insured against, general averages; that these averages may be adjusted abroad; and that the assured will be bound by such adjustment, although in making it conformably to the law and usages of the places where made, both the sum to be contributed and the contributory interests may be estimated upon principles varying from those which prevail at the place where the contract of insurance is made. It seems to follow as a necessary consequence that, when the assured has incurred a general-average loss within the perils insured against, when such loss has been adjusted at the proper place, and in a mode conformable to the law and usage of such place, and when the assured has thus become bound to pay

and has paid such loss, he is entitled to recover it of the underwriter, although the contributory interests have been estimated upon a principle different from that of the place where the policy was underwritten." This question was discussed by Mr. Justice *Story* in *Peters v. Warren Ins. Co.*, 1 Story, 463, and a strong opinion expressed in favor of the binding effect of a foreign adjustment, though he expressly stated that he did not wish to be understood as deciding the point. He says: "The contract of insurance is a contract of indemnity against risks and losses by the perils insured against, not only in the home port and on the ocean, but also in foreign ports. It naturally therefore looks to general averages which may be incurred and enforced abroad as well as at home. If, by a peril insured against, the insured is compelled in a foreign port, by the local law, to pay a sum as general average which by the law of his own country would not be so, why may not such a loss or charge be properly deemed a general average in the sense of the policy? What difference in principle is there between deciding that items or apportionments included in a foreign adjustment of a general average, although not belonging to a general average, or a proper apportionment by the law of our own country, are nevertheless to be here paid for as a general average, and deciding that a loss, not a general average by our law, but a general average by the foreign law, and enforced there, is to be deemed and paid for here as a general average? In each case the loss sought to be reversed is, *pro tanto*, not a general average according to our law; and the

thus: if the cargo is to be separated in a foreign port, the contributory share of the cargo leaving the ship should be paid on

principle which is to govern must be the same whether the loss be greater or less, whether it apply to the totality of the claims, or to any item thereof. Now, certainly, the weight of authority, both in England and America is that the items included and the sums apportioned and paid according to the law of a foreign country, as a general average in an adjustment thereof made there, and, *a fortiori*, if enforced by the public tribunals there, are, *quoad* the items and the rule of apportionment, conclusive upon and payable by the underwriters here as a general average, although not apportioned in the same manner, and not deemed items of general average by our law. . . . There is nothing unreasonable in construing the engagement of the underwriters in a policy to be that they will pay whatever the insured in a policy is compelled to pay as a general average, arising from the risks insured against."

In *Simonds v. White*, 2 B. & C. 805, this question arose between a shipper and ship-owner, and it was there decided that a loss by general average was to be calculated between them according to the law of the port of discharge; and in the subsequent case of *Dalglish v. Davidson*, 5 D. & R. 6, decided upon the authority of *Simonds v. White*, it was held that the owner of a British ship might avail himself of a statement of average made at the port of delivery in a foreign country, according to the law thereof, so as to charge a British freighter of goods, under a charter made in Britain, with the expenses of wages and provisions for the seamen, incurred during the necessary detention of the ship at an

intermediate port, although by the law of England such expenses would not be recoverable as average. The following from the opinion of Chief Justice *Abbott*, in *Simonds v. White*, would seem to apply to the underwriter as well as to the shipper. He says: "The shipper of goods tacitly, if not expressly, assents to general average, as a known maritime usage, which may, according to the events of the voyage, be either beneficial or disadvantageous to him. And by assenting to general average he must be understood to assent also to its adjustment, and to its adjustment at the usual and proper place; and to all this it seems to us to be only an obvious consequence to add, that he must be understood to consent also to its adjustment according to the usage and law of the place at which the adjustment is to be made." See also *Lewis v. Williams*, 1 Hall, 430, where the question was between two shippers, and where Mobile was considered, upon a question of average, to be a foreign port in relation to New York; and where an adjustment made at the former place was held to be binding upon shippers at the latter. In giving the reasons for the rule the court said: "The grounds upon which the foreign adjustment is held conclusive are, that it is the duty of the master to cause the adjustment to be made, and to see to the settlement of the averages; and that the parties are compellable to submit to the assessments upon them that may be coerced by suit or by the detention of the goods to pay the contributions as settled there; and if the adjustment could be opened at the home port, and a new rule of apportionment be

the spot to the party entitled to contribution. The adjuster at that place must be bound by the law of that place, and cannot be held to know the law of a distant port. And the ship cannot be delayed until he has time to inquire and ascertain that law. The adjustment covers all the interests at risk, and cannot be gone into afterwards at another place, and reformed throughout (if reformed at all it must be throughout), after a part of the cargo has been left at another place and is out of the reach of the parties. And it may be added that if an owner or shipper loses by the difference in the rules of adjustment in one case, he may gain in another; and this practical rule, like some others of the law-merchant, is founded on the average of all the cases, and on the whole does justice.

But if these reasons are sufficient to make a foreign adjustment final between owners and shippers, other principles may well come in when another party comes in, and that is the insurers of ship or cargo. The contract of insurance is made between parties, one of whom, the promising party, has a permanent location. In that place he enters into the contract, there he receives his premium, and there he will make whatever payment the contract requires him to make. No rule of the law of place is more generally recognized, or more firmly established, than that the contract must be governed by the law of the place where it is made and is to be performed. We may suppose a ship and cargo owned in one country, bound to a second country, and insured in a third. Now if a peril insured against compels the ship to incur heavy and various expenses, these must be distributed upon the ship, or the cargo, or the insurer of the ship or of the cargo.

The three countries of home, insurance, and destination may have three systems of law by which this distribution is regulated.

applied, great and manifest injustice must often be done to some of the parties, without any remedy for the wrong done them by the derangement. . . . In most cases of foreign adjustment the averages are from necessity settled and paid by the parties who are to contribute, without reference to the question of insurance. It would be against the principle and true spirit of the rule

to allow the contributory parties who are uninsured to open the adjustment, and to hold it conclusive upon those whose interests are insured and upon their underwriters. There can be no solid ground for the distinction; the adjustment must be equally conclusive upon all the persons and interests actually brought into the settlement of the average."

Let us further suppose an adjustment of this made at a foreign port, and this may be the port of final destination. It may be certain that the owners of all these interests are bound, in reference to each other, by this adjustment. But when one of them comes to his insurer, may he not say, I must be governed by the law of *my place*, as to the obligations imposed upon me by my contract made here? And if, in the case supposed, the insurer profits by the difference of the laws, and therefore does not assert this home principle, as it may be called, may not the insured who suffers from this difference assert it in his own behalf?

There is a great appearance of justice in this view, and our notes will show that it is sustained by authorities entitled to respect. We think, however, that this is but one illustration of a mistake of which more than one instance can be shown. Courts of common law, both in England and in this country, now acknowledge the law-merchant as a part of the common law; but they are accustomed to cases which are governed by the common law of the land and not of the sea, and to administer justice in cases of the land, by applying to them a system of law admirably adjusted to that end. And they are strongly disposed to apply the same system to all contracts. It might be well, in some cases at least, if the common-law courts, in judging maritime contracts, were more influenced by a spirit like that manifested by the Emperor Antonine in the rescript which founded for the civil law the law of general average. He says: "I am the lord of the world, but the law is the lord of the sea"; and then goes on to show that in this case, by the lord of the sea, he means the law of the island of Rhodes even then ancient, which was only the system of rules and usages practised by all engaged in the commerce of the Mediterranean.¹

The contract of insurance is eminently a maritime contract. The policy is made upon a designated voyage, or upon a fixed time, and with rights or liberties given by the law, and known to be so, or agreed upon by the parties. Whatever risks can arise, and this one among the number, may be estimated. And it can be no hardship to them to require them to be governed by the law of any place visited by the ship while under insurance, if the law of that place becomes applicable to the interest insured,

¹ Digest, lib. 14. tit. 2. § 9.

within that voyage or in that time. The diversity of these rules is less than it was, and as we think is growing less than it is, under the tendency of the law-merchant to become one system, and to form a part of the law of nations without disturbance from local peculiarities. In a case in which this very question arose, Buller, J., said: "On the general law the plaintiff would fail, but in all matters of trade usage is a sacred thing."¹

At the same time, we by no means assert that insurers are bound by a foreign adjustment, in all respects. Where there is a foreign adjustment of the contributions by the several interests for a loss which is the subject of general contribution in both countries, the several interests must be bound by the distribution of these contributions, determined by the law of the place where the adjustment is made. But if the general-average law, at the place of adjustment, includes within that average, and therefore gives a right of contribution for, a loss which in the home port would be a particular average, or a partial loss, we should say that the owner receiving this contribution cannot claim of the insurers the whole of his partial loss, without deducting what he has received by way of contribution; for this makes his loss so much less. But for the residue the insurers would be bound to him.

And if the insured was held in a foreign port to pay contribution for a loss, against which, by the home construction of the policy, he is not insured, the insurers would not be bound by this foreign adjustment to repay to him this contribution. We do not consider what we have said as stating any exceptions to the general rule; nor are we sure that a rule, resting so far as authority is concerned, on one case, but applied as we know in another, should be regarded as an exception. This rule is, that where, in a foreign adjustment of an average loss, certain contributory claims are denied to the party suffering the loss, which claims would be allowed to him at home, the insurers at home cannot say, that the foreign adjustment of the loss is so far conclusive against the insured, and in their favor, that he is not entitled to indemnity from them for any items of loss denied him by that adjustment.²

¹ *Newman v. Cazalet*, *Sittings at Guildhall after Hilary*, cited in *Park on Ins.* (8th ed.) 900.

² *Thornton v. U. S. Ins. Co.*, 3 *Fairf.* 150. This was an action of *assumpsit* on a policy of insurance, in which the

It may be said, however, that if such an adjustment is binding, when it is in favor of the assured, if the facts were reversed and it favored the underwriter, it should be binding on the insured. It might, perhaps, be answered, that the bargain between them might give this advantage to the insurers, and not to the insured; and that the risk might be contemplated in making their bargain.¹

plaintiff claimed to recover for losses under both general and particular average. The plaintiff's ship, insured by the defendants, being on a voyage from Richmond, Maine, to Bremen, was compelled to put into Cuxhaven, an intermediate port, for the preservation of the ship, cargo, and lives of the crew. On the arrival of the ship at Bremen, the port of discharge, a general average of the loss was adjusted by the proper officers there; but in this adjustment no notice was taken of the wages and victualling of the crew, after the ship bore away for Cuxhaven. By the American law these expenses would have been allowed as a general average. The question was, whether the Bremen adjustment was to be taken as conclusive between the parties. It was held that it was not conclusive, but that the ship-owner might show that items of loss were omitted in the adjustment which by the laws of this country, where the contract was entered into, should have been included. The court said: "We know it is often said in the books that the foreign adjustment is conclusive; as between the parties it unquestionably is so. The party contributing can recover nothing back; the party to whom the contribution is made can recover nothing further; and he who has been compelled actually to contribute on the basis of the foreign adjustment can recover of his insurer the amount thus contributed, and nothing more. To this extent we admit the conclusive character of foreign adjust-

ments, but have been unable to find adjudged cases to carry us further. We have found no case where the party to whom the contribution has been made has been restricted, in his claim upon his underwriters, to the sum apportioned as his share of the loss, by the foreign adjustment, when that sum fell short of a complete indemnity, according to the law of the place where the contract of assurance was entered into. If the foreign adjustment includes as general average what constitutes only a partial loss or particular average according to the authorities, the adjustment is not binding upon the underwriters, either because the loss was not covered by the policy, or, not coming within the term 'general average,' is not to be adjusted abroad; and we do not perceive any good reason against applying a similar rule in favor of the insured in cases where, by the foreign adjustment, losses are excluded which by the law of the place where the contract was made are considered as falling within general average."

¹ As to the practical rule we have what we consider the valuable authority of Mr. Dixon, in his handbook of marine insurance and average. On page 162 he says: "I have, as adjuster of averages for one of the principal insurance companies of New York, had an opportunity of examining hundreds of statements in which the column of general average disallowed items which would be admitted by our custom; and, on the other hand, comprehended items

We are content to say that, whatever rule was adopted, it should be applied equally, whether it favored one party or the other; and this we suppose to be the practice.

Mr. Phillips makes still another exception; because a shipper may receive the goods at any port at which the ship arrives, by paying full freight, if he chooses to receive them at an intermediate port, because of a favorable market there, or for any other reason, he will still have the right to have the adjustment made on the principles which would be applied at the port of destination.¹ We see no sufficient reason for this. He may take his goods if he chooses, but must take them subject to the law of adjustment at the place where he takes them. On this point we should agree with Mr. Stevens, who says that a particular average cannot be adjusted in the usual mode, short of the port of destination.² Mr. Phillips himself confines his remark to the case of particular average. If this be merely a partial loss, and there is no need of an adjustment elsewhere than at home, there may be ground for his view. But we certainly should not apply it to the case of particular average included in the general-average adjustment made abroad for sufficient reasons.

It must, however, be remembered that this conclusiveness of a foreign adjustment cannot prevent a party interested from availing himself of a defence against a claim for contribution, which goes to the foundation, not merely of the adjustment, but of the whole right or necessity of any adjustment. Thus, where an adjustment was made on the protest and testimony of the master, the owner of goods on board was permitted to show that the loss arose from the want of care and skill of the master himself, and was not therefore a case for general-average adjustment.³

which would be disallowed here; and, except in one or two very extreme cases, I have found the average adjusters, by making no readjustment of those items at the home port, practically hold that when a foreign adjustment is rightly settled according to the laws and usages of the foreign port, it is binding, not only as between the parties interested in the adventure, but also as between the assured and the underwriters."

¹ 2 Phillips on Ins. § 1467.

² Stevens & Benecké on Av. (Phil. ed.) 285.

³ Chamberlain v. Reed, 13 Maine, 357.

SECTION X. — *Of the Enforcement of the Payment of Contributory Shares.*

THE owners of the property on which the contribution is properly assessed are liable for it in an action by the party by whom it is receivable.¹ The consignee may be the owner of the goods contributing, and then will be liable as owner. He will not, however, be liable merely as consignee. He may refuse to receive the goods from which the contribution is payable. But even if he receives the goods only as consignee, this raises no implied promise on his part to pay the contribution.

The common provisions of the bill of lading under which he claimed and received the goods would not make him liable. If, however, a clause were added that the goods were to be delivered only on payment of contributory charges, as Lord Tenterden suggested,² this might make him personally liable. He could certainly not claim the goods without paying contribution, but we are not quite certain, that, if the goods were delivered to him without promise of payment on his part, the mere reception of them would make him personally liable for them even under that clause. Such questions, however, can hardly come up under the prevailing practice in this respect.

It is a rule of the law-merchant, which we suppose to be a universal one, that the master, as the agent of all concerned, has a lien on all the goods in the ship for their contributory shares.³

¹ Lenders on bottomry and respondentia are liable to contribution in general average. *Chandler v. Garnier*, 6 Mart. La. N. S. 599. The owner of goods chargeable with general average is personally liable for the amount of his contribution, notwithstanding he has abandoned to the underwriters. *Del. Ins. Co. v. Delannie*, 3 Binn. 295.

² *Scaif v. Tobin*, 3 B. & Ad. 523. Lord Tenterden here says: "There can be no doubt that if a person receives goods in pursuance of a bill of lading in which it is expressed that the goods are to be delivered to him, he paying freight, he by implication en-

gages to pay freight, and so he would to pay general average, if that were mentioned in the bill of lading. But here general average is not so mentioned. It may perhaps be prudent in future to introduce into a bill of lading an express stipulation that the party receiving the goods shall pay general average; but if we were to hold the defendant liable for it in the present instance, we should be going one step further than we are warranted in doing by any decided case."

³ *Strong v. N. Y. Firem. Ins. Co.*, 11 Johns. 323; *Sherwood v. Ruggles*, 2 Sandf. 55; *Thornton v. U. S. Ins. Co.*,

He may refuse to deliver the goods until the contribution be paid, and sometimes does so. But it often happens that the consignees require the goods before an adjustment is made, and consequently before they know their respective shares for contribution; and sometimes a considerable time is required to make a complicated adjustment. To meet such an exigency, the master takes from all the consignees a bond by which each one agrees to pay the contribution due from the goods he receives, when the same shall be adjusted. This is now a common practice.¹

The question may arise, however, whether this unquestionable right of the master² is also his duty; that is, is he bound to retain the goods until the contributory shares are either paid or secured? He is undoubtedly so far the agent of the party entitled to contribution, that if the contributing party pays in good faith to the master all that is due from him, and the master fraudulently keeps the money for his own use, the contributing party is nevertheless discharged from all liability.³ But is he the agent of the contributing party only with power, and not with duty? The civil law held him bound to collect their share from all contributing parties, and pay them to, or hold them for, the receiving parties.⁴ The ordinance de la marine of

3 Fairf. 150; *Chamberlain v. Reed*, 13 Me. 357; *U. S. v. Wilder*, 3 Sumner, 308; *Simonds v. White*, 2 B. & C. 805; *Briggs v. Merchant Traders' Ass.*, 13 Ad. & El., N. S. 167, 174; *Hallett v. Bousfield*, 18 Ves., Jr., 187; *Gillett v. Ellis*, 11 Ill. 579. The ship-owner's remedy against the consignee is not lost by the latter's receiving the cargo at the port of necessity, and forwarding it himself to its destination. *Sherwood v. Ruggles*, 2 Sandf. S. C. 55.

¹ *Abbott on Shipping* (8th ed.) 614. Where, after a general-average loss, the several consignees of the goods, upon the requirement of the master, executed a bond reciting the accident, and admitting that thereby the schooner had been obliged to employ lighters, and to

throw overboard a part of the cargo, whereby a general average had accrued, and in which the subscribers agreed to pay their respective proportions of the average as soon as adjusted, it was held that this was a personal obligation, and did not bind the shipper of the goods. *Eckford v. Wood*, 5 Ala. 136.

² That the captain has a right to demand of the consignee that he sign an average bond before delivery of the goods, see *Cole v. Bartlett*, 4 La. 130.

³ *Eckford v. Wood*, *supra*.

⁴ Dig. 14, 2, 2. See also *Wellwood*, tit. 21. The owners of a vessel who collect the contributory shares are entitled to a commission of two and one half per cent. *Barnard v. Adams*, 10 How.

Louis XIV.¹ contains a similar provision; still it must be stated that Valin, in his Commentary, which is of the highest authority, denies that this is done in practice.² And we should infer from the language of Abbott, Lord Tenterden, that there was no such law or usage in England.³

A singular case before Lord Chancellor Eldon would imply that the master, while he has the right to retain the cargo, is not bound to do so by any obligation to the receiving party, or, at all events, any which equity would enforce.⁴

We are not aware that this point has been distinctly determined by adjudication in England. There are cases which recognize the lien, but do not define it, or state expressly whether the master is not only possessed of a right, but bound by a duty.⁵ We are, however, quite confident that both usage and law in this country make it his duty to refuse to deliver the goods to their consignees, unless their contributory shares are paid for or in some way secured. It has indeed been decided, that a shipper, losing the contribution to which he was entitled, by a neglect of the master

270, 308; *Sturgess v. Cary*, 2 Curt. C. C. 382. The language of the court, in *Barnard v. Adams*, would imply that the right to charge this commission rested on the custom of average brokers; but in *Sturgess v. Cary*, Mr. Justice *Curtis* stated that he had obtained a copy of the record in that case, and found that no evidence of any usage was offered, and that the presiding judge instructed the jury, as matter of law, that the charge was correct, which ruling, being excepted to, was sustained by the Supreme Court. He accordingly held, that a usage in the city of Boston not to allow such charge was not admissible to contravene the general rule of the law-merchant.

¹ Liv. 3, tit. 8, Du Jet. art. 21.

² Valin, tom. 2, p. 21. See also Pothier on Maritime Contracts (Cushing's ed.) p. 76, n. 134.

³ Abbott on Shipping (8th ed.) 613.

⁴ *Hallett v. Bousfield*, 18 Ves. 187.

In this case a motion was made, by the owner of goods which had been jettisoned for the safety of the vessel and cargo, for an injunction to prevent the master from delivering over the rest of the cargo to the other shippers. The motion was refused by Lord *Eldon*, on the ground that, though the master was not bound to part with any of the cargo, until security should be given by each shipper for his proportion of the loss, yet that any owner of a part of a cargo could not compel him to do so.

⁵ See *Scaif v. Tobin*, 3 B. & Ad. 523; *Simonds v. White*, 2 B. & C. 805. In the latter case, Chief Justice *Abbott* remarks incidentally: "I believe, also, that all are agreed on another point, namely, that the master is not compellable to part with the possession of goods until the sum contributable in respect of them shall be either paid or secured to his satisfaction."

in the discharge of his duty, would hold the ship-owners responsible.¹

So, it has been said that, if a master delivers the contributing goods to the consignee without receiving contribution, and then pays it himself to the party entitled to contribution, the master has an implied assumpsit against the consignee for what he has paid.² If this be so, it would seem that the reception of the goods should make the consignee liable.

But any claim of the party entitled to receive contribution against the ship-owners on this ground must be founded upon the neglect of the master. If he takes an average bond or other security with due care, or with a reasonable belief that it is sufficient, and the security fails from no fault of the master, the ship-owners should not be bound.

The owner of the goods is liable for his contributory share, although the consignee executes a general-average bond; for this bond is not itself payment of the contributory share, and therefore does not discharge the owner.³

It has been held, that if one shipper of a general cargo pays all the general-average expenses incurred by a common peril,

¹ *Gillett v. Ellis*, 11 Ill. 579, 582. In this case, the court says: "The plaintiff's goods having been sacrificed for the common benefit of the owners of the vessel and the remaining portion of the cargo, it is very clear that he was entitled to contribution for them. It was the duty of the master to have caused a general average to be made, and enforced the payment of the part due from the owners of the cargo. He was bound to adjust an average, and he had the right to detain the cargo until the average was paid. It clearly results from this obligation of the master to settle an average, and this right to require payment from the consignees, that the defendants, for whom the master was acting, are responsible to the plaintiff. The latter has the right to recover from them whatever he might have received under a general average,

fairly and honestly made. Where the law imposes an obligation on a party, and confers upon him the power of enforcing it, as in this case, by a lien, it equally imposes a liability for the neglect of the obligation." See also *Du-pont de Nemours v. Vance*, 19 How. 162, *infra*, p. 376, n. 1.

² *Eckford v. Wood*, 5 Ala. 136, 140. The court, in this case, remarked that, "conceding the master cannot sue or be sued, according to the common law, we cannot doubt that if the master, or the consignee, who is his agent, voluntarily parts with goods which he is authorized to retain, and afterwards pays the contribution for which he could have retained them, an implied assumpsit is raised that he shall be repaid by the owner."

³ *Eckford v. Wood*, *supra*.

he has a right of action against the other shippers for their proportions.¹ We infer from English authorities that, when the English East India Company charter a ship, they stipulate that there shall be no claim for contribution for general average.² We are not aware that such a practice prevails or exists in this country. Public property is not exempt from liability for a contribution.³

It could not be reached, however, in this country by a suit against the United States, unless perhaps it were brought before the Court of Claims. But it has been held that the ship-owner has a right of lien against goods belonging to the United States government, until he is reimbursed what that government should pay by way of contribution in general average. It is in this case that Judge Story remarks, that the general maritime law gives a lien *in rem* for the contribution; and while this is not always the only remedy, but often the best and sometimes the only one as it certainly is where the owner of the goods is not known, he adds, that without such a lien the ship-owner would be without any adequate redress, "and would encounter most perilous responsibility." It is not quite certain that he means by this a responsibility for the contribution which any persons were entitled to receive, if he delivered to the contributing shippers their goods without taking security. If he means this, it would go far to sustain the view we have expressed, that the master, as the agent of the owner, is not only entitled to retain the goods, but is bound

¹ Kern v. Groning, 1 Brevard, 506; Dobson v. Wilson, 3 Campb. 480. In Birkley v. Presgrave, 1 East, 220, it was held that a special action of assumpsit might be maintained by the owner of a ship against the owner of part of the cargo, to recover from him his proportion of a general-average loss, incurred by cutting the cable and part of the tackle of the ship, and applying them to a use for which they were not originally intended, for the general preservation of the whole concern. Park, in his work on Insurance, p. 298 (8th ed.) says: "In the case of an expenditure of money, *probably* an

action for money paid *might* be maintained against each of those who were benefited by such expenditure. But as this would lead to a multiplicity of actions, and this species of action is not applicable to the case of goods thrown overboard, the better mode, in all cases, seems to be to apply for contribution to a court of equity, where effectual relief may be obtained against all the parties in one suit."

² Hughes on Ins. 296; Stevens & Benecké on Av. (Phil. ed.) 252; Jackson v. Charnock, 8 T. R. 509.

³ United States v. Wilder,³ Sumner, 308, 312, *supra*, p. 341, n. 2.

to do so, and his language would seem to be too strong to permit the belief that he had in mind only the ship-owner's danger of losing the contributory share to which he was himself entitled.¹

¹ In the case of *Dupont de Nemours v. Vance*, 19 How. 162, Mr. Justice Curtis remarks as follows upon the subject of liens, in cases of general average: "When a lawful jettison of cargo is made, and the vessel and its remaining cargo are thereby relieved from the impending peril, and ultimately arrive in the port of destination, though the shipper has not a lien on the vessel for the value of his merchandise jettisoned, he has a lien for that part of its value which the vessel and its freight are bound to contribute towards his indemnity for the sacrifice which has been made for the common benefit. And this lien on the vessel is a maritime lien, operating by the maritime law as a hypothecation of the vessel, and capable of being enforced by proceedings *in rem*. . . . The power and duty of the master to retain and cause a judicial sale of the merchandise saved has also

been long established. And this right to enforce a judicial sale, through what we term a lien *in rem*, is not confined to the merchandise, but extends to the vessel. . . . It would be extraordinary if the right to a lien were not reciprocal; if it existed in favor of the vessel, when sacrifice was made of part or the whole of its value, for preservation of the cargo, and not against the vessel, when sacrifice was made of the cargo for preservation of the vessel. . . . On full consideration, we are of opinion that, when cargo is lawfully jettisoned, its owner has, by the maritime law, a lien on the vessel for its contributory share of the general-average compensation; and that the owner of the cargo may enforce payment thereof by a proper proceeding *in rem* against the vessel, and against the residue of the cargo, if it has not been delivered."

CHAPTER VII.

OF PARTIAL LOSS OR PARTICULAR AVERAGE.

WE place both these phrases at the head of this chapter, because both are in use among merchants and in law books. The phrase "partial loss" is, however, gaining upon the other, and we think it far better. Mr. Phillips¹ considers that it is reason enough for using the term "particular average" that it has been so long used, and that its meaning is now definite. These are good reasons as far as they go. He adds, however, as a third reason, that "this mode of expression is often very convenient." We cannot, however, now recall an instance in which the phrase "partial loss" is not at least equally convenient. Mr. Benecké² draws this distinction: he would apply "particular average" to cases of diminution of value, or loss by expenditure, which are to be borne by the owner of the property or by his insurers; while he applies the phrase "partial loss" to the total destruction of a part of the property. At the same time he appears to consider that "partial loss" covers all of these losses; while "particular average" is limited to those first described. Mr. Phillips³ thinks that these distinctions are in conformity to the customary use of the terms, but we have much doubt whether they are generally made, or made with any precision.⁴

The word "average," whatever was its original meaning, which is somewhat uncertain, always now, by universal use, means some amount or quantity which, in some way or at some rate, is to be divided among other things, or assessed upon them. But this is precisely that which is not true of what is meant by either "partial loss" or "particular average"; for partial loss is precisely a

¹ 2 Phil. on Ins. 1432.

² Stevens & Benecké on Average, ch. 9. See also Hughes on Ins. *374.

³ 2 Phil. on Ins. 1422.

⁴ Mr. Arnould's distinction is: "These losses are called *partial losses* when the

extent of damage done to the merchant's property is chiefly regarded; *particular average*, when the mode of adjustment is chiefly regarded." 2 Arnould on Ins. *954.

loss which is not averaged at all, either generally or particularly. It is, by its definition, in all the books, a loss which is borne wholly by the owner of the property which is affected by it. It stands in correlation with total loss, for that is a loss of the whole, and partial loss a loss of a part; but in opposition to general average.¹

There may be a partial loss of either of the maritime and insurable interests, of ship, cargo, or freight, and in reference to either it may be caused by the destruction² of the property, or by expenses necessarily incurred for its safety. If a vessel is towed into port for repairs, the expense of towage is a partial loss of that interest for the exclusive benefit whereof it was incurred.³ So may be the expense of navigating a ship from one port to another, for a similar purpose,⁴ or the expense of launching a stranded ship.⁵ If the insurance be specifically on "the ship while being launched," all expenses incurred in preventing injury not made necessary by the fault of those employed to launch her would be a partial loss.⁶ So would be the expense of raising a sunken vessel.⁷ So damage caused by a delay in port made necessary by a pestilence there.⁸ But where a stranded ship was got off and brought home, the expense of a survey was not allowed.⁹ And it was held, that the insurers were not liable for commissions on

¹ Mr. Arnould, vol. 2, p. *955, admits that the use of the word "average" in the sense of loss is *prima facie* objectionable, as tending to create confusion, but so firmly established as to make any change unwise. And Marshall censures the employment of the word in this sense. 2 Marsh. on Ins. 462. In *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 33, 39, Chancellor *Walworth* says: "Partial loss includes both general and particular average; and the latter term includes all partial losses, except general average." But see *Carter v. Phoenix Ins. Co.*, 2 Wash. C. C. 51.

² *Wadsworth v. Pacific Ins. Co.*, 4 Wend. 33; *Brooks v. Oriental Ins. Co.*, 7 Pick. 259.

³ *Perry v. Ohio Ins. Co.*, 5 Ohio, 305.

⁴ *Lincoln v. Hope Ins. Co.*, 8 Gray, 22.

⁵ *Dix v. Union Ins. Co.*, 23 Mo. 57.

⁶ *Frichette v. State Mut. Fire & M. Ins. Co.*, 3 Bosworth, 190.

⁷ As the expenses of raising a steamer sunk in the Ohio River, such as blankets for stopping a leak, and plank used for making pumps, and the expense of taking her to Louisville, and putting her in dock, and keeping her there while repairing, being incurred exclusively on account of the boat, and not with a view to the common safety of boat and cargo, — all which were held to constitute a part of the partial loss. *Firemen's Ins. Co. v. Fitzhugh*, 4 B. Monroe, 160 — 166.

⁸ *Williams v. Smith*, 2 Caines, 1.

⁹ *Brooks v. Oriental Ins. Co.*, 7 Pick. 259. See also *Sewall v. U. S. Ins. Co.*, 11 Pick. 90, 96.

disbursements made by the owner for repairs;¹ though generally all necessary charges upon the expenses are allowed, if the expenses themselves are adjusted as a partial loss.

SECTION I. — *Partial Loss of the Ship.*

OF the ship, it may be the destruction of, or injury to, any part of the hull, or of the sails, or rigging, or boats, or of anything so appurtenant to the ship that it is included in the maritime meaning of the word "ship," and is therefore included in an insurance of the ship.² It may be added, that a ship remains the same

¹ *Sage v. Middletown Ins. Co.*, 1 Conn. 239.

² 1 *Magens on Ins.* p. 52, § 51. For insurance purposes the word "ship" includes "all that belongs to it, as hull, sails, rigging, tackle, apparel, or furniture." In a policy of insurance the word "ship" *prima facie* includes the boat, unless it was improperly slung in the position from which it was lost. *Hall v. Ocean Ins. Co.*, 21 Pick. 472; *Emerigon*, c. 6, § 7 (*Meredith's ed.*) 143. See also *Shannon v. Owen*, 1 Man. & R. 392. As to fishing stores, see *The Dundee*, 1 Hagg. Adm. 109; affirmed in *Gale v. Laurie*, 5 B. & C. 156. In *Mason v. Franklin Ins. Co.*, 12 Gill & J. 468, it was held that an insurance "on a new bark now being built" covered only the vessel in process of construction, and not articles made for her, delivered in the ship-yard where she was building, and intended to be attached to her as soon as she was ready to receive them. And in New York this principle has been carried to a still greater extent. Insurance was made on a bark "on the stocks building," &c. It was held that this did not cover timbers not united to the structure, although they were intended and completely prepared to be used in the framework, in the proper place for that

use, and valueless for any other vessel. *Hood v. Manhattan F. Ins. Co.*, 1 Kern. 532, overruling the same case in the Superior Court, 2 Duer, 191. And the same principle has been applied to a house. *Ellmaker v. Franklin Fire Ins. Co.*, 5 Barr, 183. Provisions on board for the use of the crew were held to be covered by a policy on the ship and furniture in *Brough v. Whitmore*, 4 T. R. 206; and the remark of Lord Mansfield, C. J., in *Robertson v. Ewer*, 1 T. R. 127, that "in a policy on a ship sailors' wages or provisions are never allowed in settling the damages," was said to refer, not to the provisions taken on board as a part of the outfit, but to those purchased or used in a port where the vessel was detained. *Emerigon*, ch. 10, s. 1, § 2 (*Meredith's ed.*) 234, says: "The expression in the *body* embraces in its generality, as I have just said, all that regards the ship; such are the hull of the vessel, its rigging and apparel, munitions of war, stores, and victualling, advances to the crew, and all that has been expended in the fitting it out." See also, as to provisions, the opinion of the court in *Kemble v. Bowne*, 1 Caines, 75 - 80. In this case a list of expenses allowed in making up the amount for which the insurers were responsible included hire of hands for rigging and ballasting, bills

ship, preserving its identity, however extensively or repeatedly repaired.

Whenever partial losses occur by injury to the ship, through storm or by any peril insured against, if the injury be such that the age, weakness, or insufficiency of the thing injured may have contributed to it, as if sails are blown away, spars broken and lost, bulwarks carried away, or boats from the davits, the insured must satisfy the jury that the vessel was sea-worthy when she sailed. If then sea-worthy, the subsequent decay or weakness of the thing, although not caused by a peril insured against, would not prevent the insurers from being liable for a loss actually caused by such a peril; unless, indeed, it could be shown that the decay had brought the thing below the standard of sea-worthiness, and the vessel had afterwards been in a port in which she might have been restored to sea-worthiness, and this was not done.¹

Whatever the loss be, insurers are not liable unless it be caused by one of the perils against which they insure. But it may be by any one of them, as by wreck, fire, collision, stranding, lightning, battle, or plunder.² And, as a universal rule, it may be stated that as total loss, general average, and partial loss include all losses for which insurers are responsible, any such loss which does not come in either of the first two classes must belong to the third.

As the expenses directly incident to a general average loss form a part of that loss, and are averaged accordingly,³ so the expenses of raising funds for partial loss are to be paid for by the insurer, in the proportion in which he is liable for the loss itself.⁴

of carpenters and blacksmiths, bills for calking long-boat, for crockery for cabin, for ship-chandler's stores, for cordage, sails, cable, spars, coopering, for a boat, an anchor, for provisions and water.

The outfits of a whaling voyage are held not to be covered by a policy on the ship. *Hoskins v. Pickersgill*, 3 Doug. 222; *Gale v. Laurie*, 5 B. & C. 156, 164. See *Hill v. Patten*, 8 East, 373. Probably a chronometer would now be considered a necessary appurtenance to a ship, so as to be covered by the insurance. See *Richardson v. Clark*, 15 Me. 421, 425. Whatever

alteration or addition the ship may undergo by repairs, she will still be within the insurance. *Le Cheminant v. Pearson*, 4 Taunt. 367. See *Levie v. Janson*, 12 East, 648.

¹ See *Depau v. Ocean Ins. Co.*, 5 Cowen, 63; and what is said on this subject in our chapter on Implied Warranties.

² See chapter on Perils of the Sea.

³ See chapter on General Average, p. 273, and n. 2.

⁴ In *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456, the marine interest in a bottomry bond was charged to the insurers. But it must be remembered

We have seen that wages and provisions, during delay and detention for repairs, are generally a general-average loss.¹ If incurred for the benefit of the ship alone, they are not general average, the ship alone bearing them.² And the question has arisen, whether in that case the insurers of the ship are responsible for them. In an early case in New York, when they were incurred after the cargo had been delivered, and the freight earned, and were therefore held not to come within a general average, the court said: "If these expenses cannot be brought into general average, I do not see how the underwriters on the ship are to be made liable for them."³ And there are other authorities to a similar effect.⁴ We think, perhaps, a distinction may be taken here: if the crew are only detained by the necessity of making repairs for the ship alone, it may be said that this is not so directly a part of the cost of repair as to make the insurers of the ship liable. But the wages and provisions of the crew, if they were actually employed in making the repairs, might perhaps seem to be directly a part of the cost of repair. This is regarded by Mr. Phillips as distinctly held in one case in Massachusetts, but we cannot understand this case as positively asserting this doctrine, and the weight of authority would seem to be the other way.⁵ In

that, to hold the insurers, it must appear that there were no other means of raising money than by bottomry. For it is a settled rule that the master has the authority to bottom the ship only as an *ultima ratio*. In *Reade v. Commercial Ins. Co.*, 3 Johns. 352, a vessel reached her port of destination badly damaged. The consignee advanced the money for repairs on a bottomry bond at twenty-five per cent interest. The court said: "It does not appear, nor can it be fairly inferred from the evidence, that the master ever attempted to obtain the money on the credit of the owners. . . . It was the duty of the master to have exhausted all other means of raising the money before he could legally subject the insurer to the payment of an extravagant marine interest." And it was held that the insurers were not lia-

ble for the marine interest. This case was followed, and the rule said to be well settled, in *Jumel v. The Mar. Ins. Co.*, 7 Johns. 412.

¹ See chapter on General Average, *supra*, p. 257, and n. 3.

² See chapter on General Average, p. 264, n. 1, and p. 265, n. 1. *Rogers v. Murray*, 3 Bosworth, 357.

³ *Dunham v. Com. Ins. Co.*, 11 Johns. 315.

⁴ See *Sage v. Middletown Ins. Co.*, 1 Conn. 239; *Perry v. Ohio Ins. Co.*, 5, Hammond, Ohio, 305; *Gazzam v. Cincinnati Ins. Co.*, 6 Hammond, Ohio, 71; *Webb v. Protection Ins. Co.*, 6 Ohio, 456, 474.

⁵ The case cited by Mr. Phillips is *Hall v. Ocean Ins. Co.*, 21 Pick. 472. A vessel insured on a time policy, on a voyage from Frankfort, Maine, to Porto

the first-supposed case, if the delay or detention were for the common benefit, and were therefore held to be a general-average

Rico, was compelled to put into Bermuda to be repaired, and was there sold by the master. On the trial before the jury, the judge ruled, "that in a policy on time, where a vessel proceeds to a port of necessity, the clause providing that wages and provisions shall go to the general average applies to such charges only as accrue up to the time when the general average ceases by a sale or other disposition of the cargo; that a reasonable allowance for portage bill, including wages and provisions of officers and crew, for such reasonable time as would be requisite to make the repairs, should be allowed as part of the cost of repairs." This ruling was held to be incorrect, and it was held that the wages and provisions of the officers and crew, while the vessel was undergoing repairs, were not to be computed as part of the particular average; but as it would be necessary that some person should be employed on the part of the owner to superintend the repairs, this charge was to be considered as for part of the labor employed in the reparation. The court also said: "But the services of the officers and seamen might be rendered by them as laborers in making the repairs; and in such case their labor would be chargeable, just as if other laborers had been employed to make the repairs." This case hardly justifies Mr. Phillips's expression, nor do other authorities bear him out. In *Giles v. Eagle Ins. Co.*, 2 Met. 140, where the crew assisted other workmen in getting off a stranded vessel, it was not pretended that the underwriters were liable for the wages, &c., on the ground that these items were a particular aver-

age, but the insured endeavored to include them among the general-average charges. In *Sage v. Middletown Ins. Co.*, 1 Conn. 239, where the master and crew assisted in making the repairs, the court held that the underwriters were not liable; as the crew, not having been discharged, were obliged to do what they could in preventing and repairing the mischiefs incident to the voyage. So held also in *Perry v. Ohio Ins. Co.*, 5 Hammond, Ohio, 305. In *Firemen's Ins. Co. v. Fitzhugh*, 4 B. Monr. 160, it was held, where a steamboat had been sunk and raised and carried into a port for repair, and this was done for the benefit of the vessel alone, that the expenses were to be adjusted as a partial loss; and that the underwriters were liable for them, including the wages and provisions of the crew. Nor are the insurers held liable for wages and provisions of the crew while employed on repairs, when the vessel is insured on time. *Gazzam v. Ohio Ins. Co.*, Wright, 202; *Gazzam v. Cincinnati Ins. Co.*, 6 Hammond, Ohio, 71. Nor when the vessel is detained by an embargo. *McBride v. Marine Ins. Co.*, 7 Johns. 431; *Robertson v. Ewer*, 1 T. R. 127. And in this case see the opinion of the judges. Mr. Justice Bayley says: "If the ship had been detained in consequence of any injury which she had received in a storm, though the underwriter must have made good that damage, yet the insured could not have come upon him for the amount of wages or provisions during the time that she was so repairing." To the same effect, see *Fletcher v. Poole*, 1 Park, Ins. ch. 2, § iii. (p. 115, 8th ed. 1842); *De Vaux v. Salvador*, 4 Ad. & E. 420; *Dixon on*

loss, the insurers of the ship might be held to pay the share of the ship.¹ But if there was no average of those expenses, and they fell on the ship alone, we understand the practice to be not to hold the insurers responsible.

The principle of indemnity is applied to determine the portion of the cost of repairs for which the insurers are liable. They are liable for these repairs, however old or worn the ship may be, if her condition does not amount to unseaworthiness, and thereby prevent the attachment of the policy.² And it is an unquestionable principle, that if old and nearly valueless materials, whether timber, canvas, or rigging, be destroyed or removed in the work of repair, the insurers cannot insist that the materials used in their place shall be only of similar character and value.³ It is,

Mar. Ins. and Average, 166. See *Da Costa v. Newnham*, 2 T. R. 407, where the seamen, having been discharged, were employed as workmen to make repairs, and their wages allowed.

¹ See chapter on General Average.

² *Depeyster v. Columbian Ins. Co.*, 2 Caines, 85; *Depau v. Ocean Ins. Co.*, 5 Cow. 63; *Fisk v. Comm. Ins. Co.*, 18 La. 77. In this case, a brig struck on the Bahama banks, and was seriously injured. She was repaired, and the owner demanded the whole amount of expense from the insurers. This they refused to pay, on the ground that the brig was unseaworthy at the beginning of the voyage, and that the losses were not caused by the perils insured against. The evidence showed that the vessel, though old, was sound and sea-worthy when she sailed; that, when hauled up for examination, after the disaster, some of the external parts were found to be rotten. The court said: "From all the testimony in the record on this head, it would be difficult indeed to separate and class the repairs occasioned directly by the accident from those proceeding from decay and rottenness; the vessel being old,

the repairs must necessarily have been more expensive than those which the same accident would have rendered necessary in a new one; but as she is represented by most of the witnesses to have been sound and strong, she could have run a long time without any absolute want of repairs, but for the injury sustained. The defendants are, we think, bound to defray all the expense of placing her *in statu quo*."

³ A leading authority on this point is *Center v. American Ins. Co.*, 7 Cow. 564, affirmed on error in 4 Wend. 45, where the court was unanimous in sustaining the ruling of the Supreme Court. The ship *Pallas* sailed from New Orleans for Havre, and was so damaged by striking on a bar at the mouth of the Mississippi, that she had to give up her voyage. The owner abandoned, and claimed for a total loss; whereupon the question arose, whether she was damaged to half her value. The vessel required re-coppering, which could not be done at New Orleans; but she could be rendered sea-worthy for her voyage to Havre by a sheathing of wood. The insurers contended that only the expense of such sheathing as

however, obvious that, if old and worthless materials, as spars, sails, or copper, are replaced by new materials at the cost of the insurers, the insured is far more than indemnified. Probably, in the early days of marine insurance, it was attempted to form an estimate of the damage done, in each particular case, by an estimate of the damage suffered in that case, and then, if old materials were replaced by new, the insurers would pay only so much as the principle of indemnity required. The extreme inconvenience of this course early led, in different countries, to the adoption of different rules to meet this requirement of indemnity.¹ Mr. Stevens mentions a rule of an association of insurers to make no deduction on copper sheathing if it were lost and replaced during its first year, but to deduct one fifth for each succeeding year. Mr. Phillips mentions a practice of some insurers in the United States of stipulating for the deduction of two and a half per cent on the new copper put on, for each month that the old had been on. He adds, in a note, that he understands this provision to be gaining ground, and that at Bordeaux they have, or formerly had, a similar usage as to all repairs where old material was replaced by new, varying the deduction for new according to the age of the vessel.²

We have had, however, in this country, until recently, one nearly universal rule. It is to deduct in all cases one third part of the cost of new materials. This the owner bears, and the insurers are liable to him for the remaining two thirds.³

could be put on at New Orleans should be taken into account in estimating the expense of repairs. At the trial before the jury, the judge charged that the jury were bound to consider her injured to the amount of half her value, "if they believed, from the evidence, that the expense of re-coppering her at Havre or New York, in addition to such partial repairs at New Orleans as would have rendered her sea-worthy, making the usual deductions and charges, would have exceeded a moiety" of her [agreed] value. This ruling the Supreme Court, and afterwards the Court of Errors, sustained.

¹ See Benecké on Marine Ins. 457, *et seq.*

² 2 Phil. on Ins. 1431.

³ In this country, one third is deducted in all cases, whether the ship is old or new. *Mickels v. Maine F. & M. Ins. Co.*, 11 Mass. 253; *Sewall v. U. S. Ins. Co.*, 11 Pick. 90; *Dunham v. Com. Ins. Co.*, 11 Johns. 315. But in *Firemen's Ins. Co. v. Fitzhugh*, 4 B. Monr. 160, it was held that the rule of one third off new for old proceeded on the ground that the vessel was improved by the repairs; and it was doubted whether the rule would apply to steamboats, which were not considered as improved by repairing. No deduction is made in replacing anchors, either in this country or in England. In *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, 269, Mr. Justice

This rule is commonly expressed, "one third off, new for old." In England, the deduction was not made if the ship was perfectly new, or if the materials sacrificed were perfectly new;¹ and then, to apply this rule, the ship was considered perfectly new if on her first voyage.² And our notes will show that there has been some difficulty in determining what is a first voyage in this sense.³ It seems to be considered there a

Putnam says: "We do not know of anything excepted from the rule of one third new for old, but an anchor. Perhaps it may be true that an old anchor, which has been proved, is better than a new one." And in this case the one third was deducted from the cost of a new iron strap for a dead-eye. See also *Byrnes v. National Ins. Co.*, 1 Cow. 265; *Dunham v. Com. Ins. Co.*, 11 Johns. 315.

¹ *Weeskett*, tit. Repair, n. 1; *Benecké & Stevens*, on Av. (Phillips's ed.) 374; *Fenwick v. Robinson*, 3 Car. & P. 323.

² In *Thompson v. Hunter*, cited 2 Mood. & R. 51, insurance was effected in Dublin for a voyage from the Humber to the Baltic, and back. The insured relied on a usage to consider all vessels as new until they were twelve months old; but the court held that this usage could not be set up, as the policy was an Irish one. In *Poingdestre v. Royal Exch. Ass. Co.*, *Ryan & M.* 378, a vessel, ten years old, had been thoroughly repaired, and was afterwards damaged chiefly in the part which had been repaired. The insured was about to call witnesses to prove a usage to consider a vessel which had been thoroughly repaired as a new vessel; but *Best*, C. J., said that, as the jury was a special one, they were competent to judge of the usage, and whether any existed, and instructed them that the general rule should govern, unless they saw something in the case to take it out

of that rule. See *Sewall v. U. S. Ins. Co.*, 11 Pick. 90, 96.

³ In *Fenwick v. Robinson*, 3 Car. & P. 323, *S. C.* *Dans. & Lloyd*, 8, a vessel was insured "on a voyage from Bristol to New York, during her stay there, and back to her port of discharge." She performed her outward trip safely, but on the return met with a disaster, and had to be repaired. The plaintiff (the insured) claimed full indemnity from the insurers, on the ground that, the ship being on her first voyage, there must be no deduction of one third new for old. The question was whether the round trip was one voyage or two. The evidence on this question was conflicting. Lord *Tenterden* instructed the jury, which was a special one, that the whole voyage seemed to be one adventure; and that, unless the defendant had proved to their satisfaction that the return trip was a second voyage, he must pay the whole loss, without deduction. The jury found for the plaintiff, saying that they considered it as all one voyage. In *Pirie v. Steele*, 8 Car. & P. 200 (*S. C.*, 2 Mood. & R. 49), a vessel was insured for one year. As appeared by her articles, she was bound to any port in the East Indies, till her arrival in England. She went to Van Dieman's Land, then to Madras, and thence sailed for home. During this last trip, she was damaged, and the plaintiffs (the insured) sought to hold the insurers liable for all the expense of repairs, without the deduction of one

question of fact for the jury, and witnesses were admitted to determine the question by usage.¹ Recently, many of the insurance companies in this country have gone back to the rule as to copper, which we have just stated that Mr. Stevens mentions as an ancient rule; that is, a clause is inserted in the policies, providing that the allowance, new for old, in the case of copper sheathing, or, as is expressed in some policies, "copper or other sheathing," shall be measured by the age of the copper; a common form being, "two and a half per cent for each month that it shall have been on the vessel at the time of resheathing." We give this clause in our chapter on Constructive Total Loss.²

We are not aware that there is in this country any other general exception to the rule of one third off, new for old, no deduction being made on the newest ships or newest materials; the reason being, that it is here thought that the rule satisfies the justice of all the cases, taken as a whole, when all repairs, either new or old, are included.³

In one Massachusetts case, already cited, where the deduction was made from the expense of a new iron strap for a dead-eye, the court say, "they do not know anything excepted from the rule, one third new for old, but an anchor."⁴ And in another case, Shaw, C. J., says: "Here the rule is uniform and applied without exception."⁵

There is, perhaps, no universal rule as to the incidental expenses of repair, such as dockage and towing the vessel to a shipyard or back. In some places the third is deducted from these expenses. Local usage might decide the question in a case which arose under the usage.⁶ In a case in Massachusetts, third new for old. Lord Abinger said that the question, whether this was a first voyage or not, could not depend on the policy. The jury found that the round trip was all one voyage.

¹ As will be seen by the cases cited in the preceding note.

² See *ante*, p. 131.

³ *Supra*, p. 384, n. 3.

⁴ *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, *supra*, p. 384, n. 3.

⁵ *Sewall v. U. S. Ins. Co.*, 11 Pick. 90, 96.

⁶ In *Sewall v. U. S. Ins. Co.*, 11 Pick. 90, the head-note states that, one third is not to be deducted from the expense of raising a submerged vessel. But it does not appear clearly, from the report of the case, that this point was decided. Dixon on Mar. Ins. and Average, 149, note, cites the case of *Potter v. Ocean Ins. Co.*, referred to in the text, and says that, notwithstanding Mr. J. Story's ruling, "that the expense of transporting the ship to dock, or elsewhere, for repairs, should not be

an adjuster of averages, of extensive practice, stated this to be the custom in Boston,¹ and Mr. Phillips adopts and confirms his statement, and thinks the practice "well founded in respect to such charges as are directly incidental to repairs."² But Judge Story, trying a case in Boston, thought it unreasonable to apply the rule of one third off to expenses which were incidental to the loss, "for in no just sense can it be said that the owner is benefited thereby, or that he receives an enhanced value therefrom, beyond his indemnity."³

A similar question has arisen, whether one third is to be deducted from the expense of raising a submerged vessel. A head-note to a case in Pickering's reports states distinctly that the rule of deducting one third new for old does not apply to this expense of saving the ship. On a trial of the case, which turned upon the question of constructive total loss, and in which it was necessary to prove that the expenses of *repairs* and of *weighing the vessel* amounted to fifty per cent of the value of the vessel, in order to make it a total loss, Wilde, J., held, that from the amount of the repairs they were to deduct one third new for old, but that the expenses of *salvage* did not come within this rule. No especial instruction was given in regard to the expense of weighing; but from the opinion rendered by Shaw, C. J., it would seem that one third new for old was deducted from the cost of repair, "independent of the general average," and that no deduction was made from the general average, "being the cost of raising and bringing her in."⁴

If old materials are by the work of repair replaced by new materials, the old materials would, to some extent, belong to the insurers, or they should be in some way benefited by their value. Of this there is no doubt; but a question has arisen as to the way in which the computation should be made, which

subject to the deduction of one third"; Boston, in *Orrok v. Com. Ins. Co.*, 21 Pick. 456, 459.

in practice, it is a rule almost universal to make the deduction. And he goes on to say: "But one of the oldest and most respectable adjusters in the United States invariably follows the decision [of Mr. J. Story]; but the underwriters do not generally pass a claim made on that basis."

¹ Mr. Tyler, an insurance broker in Boston, in *Orrok v. Com. Ins. Co.*, 21 Pick. 456, 459.
² 2 Phil. on Ins. 1482.
³ *Potter v. Ocean Ins. Co.*, 3 Sumn. 27, 45.
⁴ *Sewall v. U. S. Ins. Co.*, 11 Pick. 90. A full statement of this case will be found in the Chapter on Actual Total Loss, *supra*, p. 70, n. 1.

was once quite uncertain, and may not now be fully determined. This question is, Shall the value of the old materials be deducted from the cost of repair, and one third be deducted from the residue or net repair? Or is one third to be deducted from the gross cost of repair, and then the value of the old materials to be deducted from the two thirds for which the insurers are responsible? Cases may arise in which these questions would be of extreme importance. Let us suppose that a sea peril renders it necessary to recopper a vessel; the cost of the new copper is \$9,000, the value of the old materials is \$3,000. If this value is first deducted from the gross cost, it leaves \$6,000 as the net cost, and one third of this being deducted new for old leaves the insurers liable for \$4,000. But if the deduction one third new for old be made from the \$9,000, it leaves \$6,000, and if the value of the old materials is deducted from this amount, the insurers are liable for only \$3,000.

The determination of this question must depend mainly, if not entirely, upon the answer to the prior question, To whom do the old materials belong, — to the insured or the insurer? If to the insurer, they are in his hands as so much money; and when the loss is ascertained by the deduction, from the cost of repair, of one third new for old, the insurer will apply the value of the old materials to the payment of the two thirds for which he is liable. But if the old materials belonged to the insured, he will apply them at once to diminish the cost of repair, and only from this diminished cost of repair will the one third be deducted. It is plain, therefore, that if the old materials are regarded as belonging to the insurer, he gets by the first computation their whole value; but if they belong to the insured, the insurer gets by the last computation only two thirds of their value. This precise question has been met in a case in New York, and it was distinctly held, that there was no abandonment of the old materials to the insurers, nor anything like an abandonment.¹

The insured cannot then claim from the insurers the whole value of the old materials to be paid to them directly, but they have the benefit of the deduction of one third from the gross amount of the repair, and then the application of the old materials to the remaining two thirds.² But, on the other hand, the insured

¹ *Byrnes v. National Ins. Co.*, 1 Cow. 265.

² See *Byrnes v. National Ins. Co.*, 1 Cow. 265.

have no right to claim of the insurers repayment of the repairs, with no reference to the value of the old materials in their hands.¹ They are to be indemnified for the cost of repair; this cost is to be ascertained by deducting from the gross cost the value of the old materials; and from this loss, under the general rule, one third is to be deducted. In Massachusetts, a similar doctrine was held, and in a subsequent case was affirmed.² And evidence being offered in this case of a usage in Boston to make the deduction from the gross cost of repair, the court held, that "no particular usage, opposed to the established principles of law, can be sustained," and, regarding this as a "well-established rule of law," applied it to the case.³

And if, in the report of a third case in Massachusetts, we may not consider that the word "gross" is a misprint for "net," the reference to the first of the two cases above mentioned is unintelligible.⁴ In these two States the practice, we understand, is in conformity to these decisions, and we suppose it to be general, if not now universal.⁵

¹ See *Byrnes v. National Ins. Co.*, 1 Cow. 265.

² *Brooks v. Oriental Ins. Co.*, 7 Pick. 259.

³ *Eager v. Atlas Ins. Co.*, 14 Pick. 141.

⁴ *Giles v. Eagle Ins. Co.*, 2 Met. 140.

⁵ The first case on this topic, so far as we are aware, and a leading authority to-day, is that of *Byrnes v. National Ins. Co.*, 1 Cow. 265, which came up in 1823. A ship, insured by the defendants, was damaged by grounding, so that a part of her copper sheathing had to be removed and replaced by new. In adjusting the loss, the plaintiff first deducted the value of the old copper, which he had sold, and then claimed from the insurers two thirds of the remainder. But the insurers insisted that they had a right to claim the deduction of one third new for old on the whole amount of the bill for the new copper.

The difference amounted to about \$280. In the decision, the court say: "The question seems to resolve itself into the inquiry, to whom do the old materials belong? If they belong to the assured, there is an end of the question; for, having been applied by them to the payment of the repairs, *pro tanto*, the assurer cannot possibly claim any further benefit from them. If there is anything in the nature of an abandonment of them to the underwriters, then the principle contended for by the defendant may be well founded. But there is nothing like an abandonment. The assured do not, and could not, claim from the underwriters the gross amount of the repairs. They can only claim the difference between that amount and the value of the old materials; for to that extent only are they injured; and an indemnity is all that they can claim. It is more analogous to the adjusting of a partial loss [on

It should be remarked that the rule of deducting one third new for old was adopted in one case in the inland navigation of this

goods], in which case the title to the goods remains in the assured. The true rule, therefore, seems to be this, — to apply the old materials towards payment for the new, and to allow the deduction of one third new for old upon the balance." This case was followed in New York, in 1825, by that of *Dickey v. N. Y. Ins. Co.*, 4 Cow. 222, affirmed on error, 3 Wend. 658, where it became necessary to determine the exact cost of repairs, in order to decide the question of the right to abandon. In the list of expenses given in the opinion of *Savage, C. J.*, p. 254 of the report, it will be seen that the items of expense are first added together, and then from the sum is deducted the value of the old copper. From this remainder the one third is then deducted.

In Massachusetts, the question came up, in 1828, in *Brooks v. Oriental Ins. Co.*, 7 Pick. 259. The vessel was repaired at Salem. The old main-sail, boat, and camboose were sold here, and new ones bought. With reference to the question, whether the one third should be deducted from the gross cost of the repairs, or from the balance, after deducting the money obtained by the sale of the old boat, &c., the court cite *Byrnes v. National Ins. Co.*, *supra*, and say that the rule there laid down appears to be the best. Before this last case had been reported, the question excited much attention among the Boston insurance companies, and they proposed, in substance, the following question to the Supreme Court, asking its opinion thereon: "Since the Boston policies, after enumerating the usual perils insured against, add, 'and all other losses and misfortunes which have

or shall come to the damage of the said ship, &c., to which assurers are liable by the rules and customs of assurance in Boston'; whether this clause, coupled with the uniform practice of deducting the one third from the gross cost of repairs, would not settle the question as to Boston policies, whatever might be the general rule of law." The opinion which was drawn up by *Jackson, J.*, as given at length in 5 Am. Jurist, 253, answers the question in the negative, for the clause above quoted "may enlarge the list of perils, but cannot affect the mode of adjustment of a loss; which must depend, not on the rules and customs of Boston, but on the general principles of law, which govern in all other parts of the country." Another opinion to the same effect is given in 5 Am. Jurist, 262. The opinion of Senator *Allen*, in *Am. Ins. Co. v. Center*, 4 Wend. 45, 55, recognizes the fact that there is nothing like an abandonment in these cases of partial loss, and admits the rule to be as laid down in the text. In 1833 the case of *Eager v. Atlas Ins. Co.*, 14 Pick. 141, came up in Massachusetts. A loss had been settled by deducting the one third new for old from the gross cost of the repairs; and it was agreed, that, if this settlement was erroneous in point of law, the plaintiff should recover the sum of \$226.87, which was the difference to which he would be entitled if the deduction of one third were to be made only from the net amount, *minus* the value of the old materials. It was also agreed that at the time of making the policy, and at the time of the loss, it was the usage of the insurance offices in Boston, where the policy was made, to make the

country, and denied in another. We believe it is now generally applied to steamers navigating our Western waters.¹

deduction of one third from the gross cost of repairs, as had been done in the settlement already made. The policy contained the usual clause about the insurers taking upon themselves the risk of perils of the sea, &c., adding, "and all other losses which have or shall come to the damage of the said ship, or any part thereof, *to which insurers are liable by the rules and customs of insurance in Boston.*" The words italicized were not in the policy in *Brooks v. Oriental Ins. Co.*, above cited. The court held: (1.) That usage did not settle the question; for even if the usage were not opposed to the rule of law, and so of no validity, still the parties were not proved to have contracted with reference to that usage. (2.) That the old materials belonged to the assured, and not to the underwriter. The previous decisions in New York and Massachusetts were sustained, and judgment given for the plaintiff. The next case was that of *Giles v. Eagle Ins. Co.*, 2 Met. 140, in 1840. This case is mentioned in the text; and the word "gross," on p. 144, in the opinion of the court must be an error of the reporter, since the court cite a case where the rule is laid down precisely contrary to what it would be were the word "gross" correct. The words of the court are: "In regard to the repairs, one third should be deducted new for old. And this deduction is to be made from the *gross* amount, as was settled in *Brooks v. Oriental Ins. Co.*, 7 Pick. 259." In 6 Am. Jurist, 45, is an opinion of Willard Phillips in favor of the doctrine of the text.

¹ *Wallace v. Ohio Ins. Co.*, 4 Ohio, 234; *Firemen's Ins. Co. v. Fitz-*

hugh, 4 B. Monr. 160. In the first of these cases, which came up in 1830, a steamboat came in collision with the steamer *Hercules*, belonging to the plaintiff. The *Hercules* was injured, and repaired at Cincinnati, at an expense of \$1,136. The vessel was insured for \$8,000. By the terms of the policy the insurers were not to be charged, unless the loss amounted to ten per cent upon the amount insured. The insurers refused to pay for the repairs; because, they contended, the loss, when reduced, according to the marine law, one third, upon the doctrine of new for old, did not amount to \$800, and for other reasons. It was agreed that the boat was not improved by the repairs. The plaintiff contended that the rule of "one third off new for old" had no application to the river navigation of the interior. In giving their opinion, the court say that, "in its practical application, the whole law of insurance is new to them; that it makes no difference whether the vessel is improved or not by the repairs, for the rule is of universal application, introduced to put an end to controversy, and doing on the whole substantial justice." The court go on to say, that "steamboats had long been in use on the rivers of England and New York, and no intimation had ever been given that the general principles of insurance law are inapplicable to river steamboat navigation. . . . Under these circumstances," say the court, "we hold it safest to adhere to the doctrine as we find it settled, and administer it as an entire system to those who claim at our hands the administration of part of it." So the deduction of one third was made,

A question analogous to that which exists in the law of total loss, as to the effect of an unpaid bottomry bond, has been raised in a case of partial loss. If money is taken upon bottomry to enable the master to make necessary repairs, and the vessel arrives safely, and the owners pay the bond, the insurers are liable for the money raised, and for the maritime interest.¹ If the vessel is lost, the bond is discharged. If the vessel arrives safely, and the owners choose not to pay the bond, the vessel goes to the obligees. The repairs are of no benefit whatever to the insured; but this is no reason why the insurers should not have the benefit of this

and judgment was given for defendants. In *Firemen's Ins. Co. v. Fitzhugh*, 4 B. Monr. 160, an action was brought to recover on a policy insuring for one year, in the sum of \$ 3,000, the one-fourth interest of the defendants in the steamer *William French*, valued at \$ 15,000. The boat was warranted free from average under ten per cent. She ran on a snag in the Ohio River, and was seriously injured. The expense of repairs amounted to \$ 2,095.71; and, the defendants having been insured to the extent of four fifths of one fourth of the entire boat, they claimed to recover the same proportion, or one fifth of the entire loss. The lower court gave judgment for the defendants in the sum of \$ 408, and the insurance company appealed. One of the questions which came up was, whether the deduction of one third should be made from the \$ 2,095. The court, who were ignorant of the case of *Wallace v. Ohio Ins. Co.*, just cited, came to the conclusion that the insurers were liable whether the deduction were made or not, as the cost of repairs in either case exceeded ten per cent on the amount insured. And they affirmed the judgment of the court below, saying that the deduction was in fact made by that judgment. But they go on to say, *obiter*: "We should not feel authorized to decide that there

should be a deduction of one third, new for old, unless bound by authority to do so. And as there are numerous and manifest differences between the case of a sea vessel and a steamboat navigating our inland rivers, — differences not only in their construction and appendages, but in the manner of their navigation and the nature of the dangers which they have to encounter, — we are not prepared, in the absence of any authority directly upon the question as applicable to the repairs of Western steamboats, and in the absence of any evidence going to show that the general effect of such repairs is to improve the boat, to admit either that the rule [if one third off] is binding here, because it has been adopted elsewhere in regard to a different subject, or that it is necessary or just to establish any fixed rule on the subject." Thus the Kentucky court did in fact, by affirming the judgment of the lower court, uphold the rule; thus agreeing with the Ohio decision, which would seem to be the law.

¹ See *ante*, p. 380, n. 4, and *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378. But if after a sale of the vessel, which the underwriters have refused to ratify by accepting the vessel, a bond be given, they are not liable for the marine interest. *Jumel v. Marine Ins. Co.*, 7 Johns. 412.

deduction of one third new for old, because, not being under any obligation to pay the bond, they are not liable for the consequences of its non-payment.¹ But if the insurers themselves order the repairs, and money is raised on bottomry to pay for them, it has been held, that, if the insurers then refuse to pay the bond, they are liable for all the damage sustained by the owner in consequence of their refusal.²

¹ In *Humphreys v. Union Ins. Co.*, 3 Mason, 429, the schooner *Zephyr*, bound from Messina for Boston, was severely damaged, and put into Lisbon for repairs, the expense of which exceeded half her value. The master, having no other means of getting money, gave a bottomry bond. As soon as the owner at Boston heard of the loss, and a few days before the arrival of the vessel at Boston, he abandoned. But the court held that there was no ground for abandonment; and that, with regard to the deduction of one third, the insurers were entitled to it. And Mr. J. Story, said: "The loss has been voluntary on the part of the owner, by his own default. He was never dispossessed of his vessel, but under a decree which he suffered because he did not choose to pay the ship's debt, contracted for his benefit and by the order of his own agent. The underwriters are therefore entitled to the deduction, because they have done no act to prevent the fullest possession by the owner." In *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378, 405, the Supreme Court say distinctly that "the underwriters have nothing to do with the bottomry bond, but are simply bound to pay the partial loss, including their share of the extra expenses of obtaining the money in that mode." And on p. 408 the court say that the loss (in this case) is a partial one; "and as to the repairs, the underwriters are entitled to the deduction of one third new for old."

² This was held in *Da Costa v. Newnham*, 2 T. R. 407. In this case the ship was so much injured as to give the owner the right to abandon. This he did not do; but upon the underwriters insisting that the vessel should be repaired, he undertook to superintend the repairs, with the distinct understanding that they should be at the risk of the underwriters. The master, having no other means of getting money, and the owner, according to the understanding that the underwriters should repair, having refused to advance any, bottomed the ship. Afterwards the ship arrived at London, and the bond was tendered to the underwriters for payment, they refused to pay, and the vessel had to be sold. "This," said the court, "put the owner into the same situation as if he had originally abandoned. And now the underwriters contend that they are entitled to the allowance of one third for repair. That indeed is the rule when a ship is repaired and delivered to the owner again for his benefit. But here, as the plaintiff never has been put into free possession again of the ship, and that through the default of the underwriters, he cannot be said to have had any benefit from the repairs, and therefore he is not bound to make that allowance." This case was cited and approved by Mr. J. Story, in *Humphreys v. Union Ins. Co.*, 3 Mason, 429; and afterwards in *Bradlie v. Maryland Ins. Co.*, 12 Pet. 378.

We have seen that the expenses for temporary repairs are usually a general-average loss; as they do not benefit the owner permanently, the deduction of one third is not made from them.¹ It may be that extraordinary expenses occur in raising funds for repair or otherwise, or in making repair, by the mere fault of the owner. We know not on what ground this expense can be charged to the insurers; but such expenses as are necessarily incurred by, or naturally belong to, the work of repair, as marine interest, loss on exchange, commissions, and compensations for assistance in repair, or transaction of business properly connected with it, are added to the cost of repair from which the deduction is made.²

It is quite well settled that the repairs should, in style, character, and materials, conform to the original construction of the boat. The insurers cannot require that they should be made as cheaply as will suffice to make the ship sea-worthy. Nor can the insured or his master profit by the opportunity of making the repairs in good part at the cost of the insurers, and make it an expense out of proportion to the original character of the vessel.³ An accident to a ship may happen when she is within reach of a port where she could be fully repaired, but only at a great expense. It may then be prudent in the master to make there only such temporary repairs as will suffice to take her safely to a home port or other port where she can be fully repaired more economically. The master has necessarily a discretion in this matter; and if he exercises it without unfairness or gross mistake, the temporary repairs will be added to the final repairs in making up the partial loss.⁴ And the deduction of one third is to be made from the whole.⁵

¹ See chapter on General Average, *supra*, p. 258.

² In *Sewall v. U. S. Ins. Co.*, 11 Pick. 90, the expense of raising and bringing in the vessel was added to the cost of repairs, in order to ascertain the whole amount of the loss for which the insurers were liable. So in *Orrok v. Com. Ins. Co.*, 21 Pick. 469, the court, after saying that the marine interest constituted a part of the loss, go on to

say: "And upon the same principle it is, that the commissions which are paid and the exchange on which funds are raised, are to be taken into the account, and borne by the party liable to make the repairs." See also *Humphreys v. Union Ins. Co.*, 3 Mason, 429.

³ *Center v. Am. Ins. Co.*, 7 Cowen, 564, 4 Wend. 45.

⁴ *Brooks v. Oriental Ins. Co.*, 7 Pick. 259. The vessel owned by the plain-

⁵ *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, cited in preceding note.

Whether these temporary repairs belong to partial loss or, to general average depends upon the question which runs through all parts of this subject. If made from necessity, in a foreign port, to enable the ship to complete her voyage and carry the cargo to its destination, they belong to general average. But if the ship could have gone along without them, and they are made for the convenience of the master and crew, or for the benefit of the ship only, they belong to partial loss.¹ It must often be difficult to make this distinction; and it seems to us that a useful test, when this question arises, is to ask whether the repairs were needed to make the ship sea-worthy, for then they should belong to general average; if not, they should be adjusted as partial loss. We are not aware that any rule of this kind has been definitely applied in adjudicated cases. It seems, however, almost

tiff was injured in a gale while on her voyage, and was temporarily repaired at an intermediate port sufficiently to enable her to reach her port of destination, where she was thoroughly repaired. The question arose, whether the insurers were liable for the expense of these temporary repairs, and the court, by *Putnam, J.*, held: "It is objected that the vessel might have been completely repaired abroad, and the fact is proved; but the expenses would very greatly have exceeded the complete repairs at Salem. We think the master had a right to exercise a sound discretion upon that matter, and that the defendants are liable for the expenses of the temporary repairs of the damage in the September gale, which are to be added to the complete repairs at Salem, which sums together are to be considered the expenses of repairing the damage sustained in that gale."

¹ In *Brooks v. Oriental Ins. Co.*, 7 Pick. 259, it was held that where a vessel insured, having lost her boat and camboose, and had her main-sail damaged in a gale, repaired the sail at sea with duck taken from the cargo, and

purchased an old boat and camboose at a port of necessity, and upon her arrival at home sold the sail, boat, and camboose, and procured new ones, the loss was particular average; but other repairs made abroad from strict necessity to enable the vessel to return, and which were of no value after her return, were held to come under general average. See also *Plummer v. Wildman*, 3 M. & S. 482, in which *Bayley, J.*, said: "I doubt whether the repair of any particular damage could be placed to the account of general average, inasmuch as it is a benefit done to the ship; and if the captain could make it a general average, by putting into port to repair, it would always be his interest to endeavor to do so. If, however, the repairs were merely such as were necessary to enable the ship to prosecute her voyage home, and were afterwards of no benefit to the ship, such repairs, I think, would properly come under a general average. Therefore, deducting the benefit, if there be any, which results to the ship from this repair, the act may be placed to the account of general average."

to grow out of the phrase which is often employed to designate repairs which should be adjusted as general average, namely, "repairs of necessity."

Collision is, we have seen, one of the risks against which the insurers insure. And we have already considered the question whether and how far insurers are liable for the indirect and consequential damages or expenses caused by collision. Here, as so often elsewhere, the question may arise, whether the expense of repair of damages caused by collision is to be adjusted as general average or as partial loss. We know no other answer than that already suggested. It is, of course, the universal rule, that no charges or expenses for injury or damage, whether they befall ship, cargo, or freight, are to be adjusted as general average, unless other interests than those directly injured are benefited by the charges or expenses. If goods are sold in any part of the voyage to raise money to pay for the repair of the ship, the owner is bound to replace them, or pay their value; and this must be the value they would have had if carried to their port of destination. The cost of doing this, or rather the extra cost of raising money in this way, as the only way he had, is to be added to the direct cost of the repairs in making up his loss.¹

One rule, which has an equal bearing upon all liability of insurers for loss, whether general or particular average, should be stated here. It is, that they are liable only for definite damages, which can be defined, ascertained, and measured. There would seem to be little doubt about the rule itself; but there is often great difficulty in the application of it; the adjudications on this subject cannot be reconciled; and the language used by courts in some cases is extremely different from that employed in others. We find it said that the insurers are never liable for invisible, uncertain, and conjectural damages. And in these cases there is distinct intimation of a test of this kind, namely, that insurers are not liable for any damage which is not, in its own nature, capable of repair.² But we find a later case, in which the same

¹ *Alers v. Tobin*, cited *Abbott on Shipping*, 372.

² In *Sage v. Middletown Ins. Co.*, 1 Conn. 243, *Baldwin, J.*, said: "It seems to be tacitly understood, in the business

of insurance, that invisible, uncertain, and conjectural damages are never the subject of remuneration. A ship stranded and got off may be strained, and thereby become less valuable; yet

court, which is strong in its rejection of all claim for such indefinite damages, admits a claim for deterioration of a ship by hogging and general disturbance of her timbers, which it would have been impossible to repair without rebuilding her; saying, at the same time, that they do not intend to shake the doctrine they have recognized "touching imaginary or theoretical strains."¹

I apprehend the injury is not the subject of adjustment, unless it is of a nature capable of repair in the ordinary course of such business; and then the loss must be ascertained by the actual expenses of such repairs, with such deductions as custom has established." See also *Peele v. Suffolk Ins. Co.*, 7 Pick. 254; *Sewall v. U. S. Ins. Co.*, 11 Pick. 91; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456.

¹ *Giles v. Eagle Ins. Co.*, 2 Met. 140. Opinion by *Putnam, J.*: "The most material subject of inquiry is the fifth item in the plaintiffs' claim, namely, 'damage of hogging and strain, \$ 835.' The facts relating to this claim are, that the plaintiffs repaired the schooner in November, 1837, to the extent of making her sea-worthy; and she has been constantly employed, and has performed her voyages well, and is insured at the same premium and at the same valuation since as she was before she received the damage. But the plaintiffs had a survey called, after she was thus repaired, to estimate the damage which had not been repaired. And it was proved that the whole body of the schooner was injured; that some of the timbers were lifted, some of her treenails started, and that the injury from the strain or hogging could not be perfectly repaired except by rebuilding her; that the hogging remained after the repairs, and that it affects, not only the beauty, but also the strength of the vessel. And the damage from the hogging and strain was estimated from \$ 800 to

\$ 1,000. It is contended for the defendants that this is an imaginary damage, for which they are not responsible; and that no such charge has been heretofore allowed in the law of insurance. *Sage v. Middletown Ins. Co.*, 1 Conn. 243; *Peele v. Suffolk Ins. Co.*, 7 Pick. 254. The case is not without its difficulties. The assured cannot be permitted to claim for unseen and imaginary damage; for there can be no standard to measure the correctness of the estimate; and the result would frequently be an allowance against the insurers commensurate with the wants to make up a total loss wherewith to charge the underwriters. But in the case before us, in consequence of the damage within the perils of the policy, some of the timbers have been lifted, and a vessel that is found to have been one of the first class is left, after her repairs, so misshapen as essentially to affect her value. There is no room for mistake about the main fact. She is obviously so much hogged as not to be perfectly repaired, unless by rebuilding her. She has been made sea-worthy; but it is in evidence that she is not so strong as she would be if she were as straight as she was built. Now the assured is entitled to an indemnity. If an insurance should be obtained upon the schooner as she now is, and a damage should happen to her, all that could be required of the underwriter would be to put her in as good a state and condition as she was when the policy was made. It could not, on any principle of indem-

But damages may be in no sense merely "imaginary or theoretical"; they may be real and unquestionable; and yet be uncertain and indefinite, and, except in their general effect on the vessel, invisible. We should say, that by the weight of authority, if they came within this last description, they would not constitute a claim against the insurers.

It may be an important question where the repairs should be made, because in one place they could be made more cheaply than in another. We have already presented one aspect of this question. But it may be well to say here, what is fully sustained by the authorities, that the master, in the exercise of his discretion on this subject, is bound to regard the interests of his ship, or rather of the owners, and not those of the insurers. He certainly should not repair her at great cost because he knows that she is insured, when he could about as well have taken her to a cheaper place, and would have done so had she been uninsured. And it may be insurers might found a partial defence on evidence that a large part of the cost was incurred only because it could be thrown on them. But, on the other hand, the insurers have no right to require the master, for their benefit, to make the repairs in any other place or any other way than he would have chosen, whether the ship were insured or not.¹ He is certainly not bound to delay his repairs until he reaches home.

nity, be required that she should be put in a better shape and condition. Here, at the time of the insurance, the schooner was of the first class. By the perils of the sea she has received an injury obvious to the eye, and essentially affecting and diminishing her value. How can it be said that the plaintiffs are indemnified, if compensation should not be made for this damage? We do not intend to shake the doctrine which we have recognized touching imaginary or theoretical strains. It may be, theoretically speaking, that, whenever a

ship takes the ground, all her timbers, from the keel to the water ways, must of necessity be in some degree disjointed. But this is not such a case. Here the danger is actual, visible, and tangible. And if this vessel should hereafter take the ground, or encounter extraordinary seas, it is not to be expected that she would stand the shock as well as if her timbers had not been lifted and disjointed."

¹ *Center v. American Ins. Co.*, 7 Cow. 564; *Brooks v. Oriental Ins. Co.*, 7 Pick. 249.

SECTION II. — *Partial Loss of Goods.*

THE simplest case of this occurs when a part of the goods insured are actually lost by a peril insured against. The amount of this loss is at once ascertained, if other goods of like kind and value arrive in safety at the port of destination, and are there sold. It may, however, be quite otherwise. All the goods may be damaged by a sea peril, and all arrive; or a part only may be damaged, and in that state arrive; or a part may be wholly lost, and the residue may arrive damaged. In all these cases the end to be sought is the same, but the ways of reaching it are many. There may be a survey and appraisalment; or a sale, with allowance for damage; or an estimate founded on the invoice price, with the freight, insurance, and other charges necessary to put those goods at that time in that place; or there may be only a reference to the price current of that time and place, as indicating the market value of the goods if uninjured, and then an allowance for the damage.

Any expenses incurred properly, in any of these ways, because necessary to ascertain the amount of damage, are allowed as a part of the partial loss. As, for example, the cost of a survey and appraisalment, or of a sale at auction, either of all the damaged goods or of a part of them, or of a sample of the sound goods. The question in all such cases is, Was that expense reasonable and proper as a means of ascertaining the amount of the loss? for, if so, it is a part of the loss.¹ And the same thing is true of truckage, storage, wharfage, and other similar charges. It

¹ *Muir v. United Ins. Co.*, 1 Caines, 48. This was an action on a policy of insurance on the cargo of the ship *Dauphin*, on a voyage from Surinam to London. It appeared that the vessel was captured at sea by a French privateer, recaptured by English vessels of war, and carried into London, where, on payment of compromise money, she was delivered up to the consignee, and the cargo sold at auction for the benefit of the underwriters. It was held that "the charges attending the auction cannot be considered a loss within the policy to be borne by the

underwriters. It was a voluntary act of the consignee, done probably in consequence of information of the abandonment, and made therefore at the peril of the owner. Had the sale at auction been to ascertain the injury the cargo had received, and limited to such parts as were damaged, it would have been a reasonable charge; but that appears not to have been the object or effect of the auction. The damage had been previously liquidated by the captain and prize-master; and, if those damages be allowed against the defendants, it is all the case will warrant."

may, perhaps, be the duty of the court to determine whether these extra charges were necessary to ascertain the partial loss, and therefore formed a part of it; we should say, however, that a jury might properly determine this; and one English case seems to proceed on this supposition.¹

If the goods arrive at the port of destination damaged by a sea peril, the calculation of the partial loss is founded on their *gross* value or proceeds, and not on their *net* value. The reason of this is plain. The gross proceeds become net proceeds by deducting from them the charges and expenses necessary to bring them at that time to that place, and turn them then and there into money. And it is obvious, that, if these charges are deducted from the value of the damaged goods, a partial loss may be converted into a total. Suppose an invoice of goods, of which the freight and insurance to their port of destination and the duties there payable amount to more than a quarter of their value there. This may still leave a large profit on them if they arrive in safety. But the freight must be the same if they arrive damaged, and the duties generally are. Now, if we suppose that they have lost by sea damage three fourths of the value they would have had if they had arrived unhurt, here is a partial loss of seventy-five per cent, because they are still worth twenty-five per cent of their sound value. But the freight and duties are more than this fourth part; and if they are deducted from the gross value of the damaged goods to make it net, there is no value left, and the insured has lost the whole. He has lost the whole, but not by a peril insured against. He has lost seventy-five per cent by that peril, and this the insurers must repay. But he has lost the remaining twenty-five per cent, because the freight and duties of the whole are charged on this lessened value. And this is not a loss against which the insurers had insured him, and of course not one for which they are liable.²

¹ In *Hudson v. Majoribanks*, 7 Moore, 463, it was held, that where, in an action on a policy of insurance, the jury find a verdict for an average loss, the court will not interfere or grant a new trial, on the ground that it should have been left to the jury to determine whether the expenses of the sale of the damaged cargo should be borne by the underwriters or not, as that fact is in the discretion of the arbitrator by whom the amount of the loss was to be ascertained.

² *Johnson v. Sheddon*, 2 East, 581; *Hurry v. Royal Ex. Ass. Co.*, 3 B. & P. 308. As to the rule for estimating a loss of goods insured under an open policy, see *Usher v. Noble*, 12 East, 639.

When a definite part of the cargo — less than one half when estimated as previously stated — is lost by a peril against which the owners are insured, this is paid for by the insurers as a partial loss. So also if the goods be not destroyed, but their value be either destroyed or diminished, the amount which the insurers pay is determined by the valuation of the goods, in a valued policy, or by the invoices if it be an open policy. It seems now to be settled, both as matter of law and of practice, that if there be different valued policies of the same goods, and the valuation in one differs from that in another, the valuation of each policy determines the amount to be paid on that policy.¹

If damaged goods reach the consignee, a sale of them is the obvious and usual way of ascertaining the amount of damage, for that is the difference between what they bring and what such goods, if uninjured, would have brought at that time and place. This determines the proportion of their value which the goods have lost by their peril; then the insurer pays this proportion of the value at which he insured them, whether this be ascertained by valuation or by invoice.²

In the case of a sale of cargo at an intermediate port, which might have been carried on in safety to the ship, and with every probability of its safe arrival in specie, so as to be bound for a full

For remarks on the case of *Johnson v. Sheddon*, see *Stevens & Benecké on Average* (Phillips's ed.) 243 *et seq.*

¹ *Murray v. Ins. Co. of Penn.*, 2 Wash. C. C. 186. *Kane v. Com. Ins. Co.*, 8 Johns. 229. The policy in this case contained the usual clause respecting prior insurance. This prior insurance was by an open policy on the cargo generally. The policy on which this suit was brought was a valued one, on goat-skins specifically, at fifty cents each. *Thompson, J.*: "In order to give effect to both policies, the first ought to be considered as attaching, in the first instance, upon that part of the cargo not covered by the latter, in order to leave aliment for the latter. The cargo, exclusive of the goat-skins, was not sufficient to absorb the prior

insurance; and the only difficulty in this case is to ascertain what portion of interest in the goat-skins had been covered by the prior policy. In estimating the loss under that policy, the goat-skins must have been reckoned at ten cents each, that being the prime cost. This is a well-settled rule, and it is equally well settled that the valuation in a policy is conclusive upon the underwriters, when there is no suggestion of fraud or imposition. *Shaw v. Felton*, 2 East, 109. The defendants are therefore estopped from saying they are not answerable for the goat-skins at fifty cents, deducting the amount covered by the former policy."

² *Jordan v. Warren Ins. Co.*, 1 Story, 342; *Pope v. Nickerson*, 3 Story, 466; *Fleming v. Smith*, 1 H. & L. 513.

freight, but the sale is made because the advancing decay of the goods makes it certainly for the benefit of the shipper, the assent of the shipper, and his consequent obligation to pay the freight which would have been earned by the carrying on of the goods, will be presumed. And if the goods are sold at an intermediate port, because of danger from spontaneous fermentation and combustion, the ship-owner may have a valid claim against his insurers for his partial loss of freight if the loss were caused by a peril insured against, or his claim against the shippers of the goods for his freight if the damage were not caused by a peril of the sea. Generally, the insurers are not discharged by any conduct of the master as to drying, restoring, selling, or destroying any cargo, if his conduct be required or justified, either by his bills of lading (if they contain no unusual provisions) or by his general duty as master.

If the goods arrive injured by a peril insured against, for this injury the insurers are held as for a partial loss. But the shipper is bound to pay the same freight for the sea-damaged goods as if they were not damaged. This may be regarded as an additional loss on his part. In one sense it is so; but it is not a loss for which the insurers of the goods are liable. This we consider to be the principle which Lord Mansfield applied to an important case stated in Park's Insurance.¹

SECTION III. — *Partial Loss of Freight.*

A QUESTION which may sometimes be a little complicated arises in a case of transshipment. That it is the duty of the master to transship goods, or send them to their destination by another ship when he cannot carry them there himself, we consider as now an unquestionable principle of maritime law in this country. If the goods thus transhipped reach their destination, they earn their

¹ Baillie v. Mondigliani, B. R. Hil. 25 Geo. III. This was an action upon a policy of insurance on goods at and from Nevis to Bristol. Before the arrival of the vessel at Bristol she was captured and condemned. In the parliament of Paris the ship and cargo were decreed to be restored. The de-

fendants paid everything but the sum demanded in this suit, which is the amount of freight *pro rata itineris* paid by the plaintiffs as owners of the goods to the owner of the ship. Lord Mansfield gave the unanimous opinion of the court for the defendants, and held that the freight was not recoverable.

freight, and there is of course no loss of freight. If the master fails to transship them when he might have done so, the freight is lost. But it is lost by the master's neglect of duty, and the insurers of freight cannot be responsible for this.

The interests of commerce require that the master should have a certain discretion in this matter. But how the exercise of this discretion affects the rights of the insurers is a distinct question. We may suppose a case in which two things are equally certain, — one, that the master might transship the goods and send them to their destination if he would; the other, that it is clearly for the interest of the shippers and of the insurers on the goods that he should sell them. He does sell them, and they do earn only a *pro rata* freight. Are the insurers on freight liable for the partial loss on freight? It would seem to be settled that they are not liable.¹ We have supposed that the goods might be transshipped and sent on, and the freight earned. But if a part of the goods be sea damaged in such a way or to such an extent that they cannot be carried forward in any ship, and are sold for this reason, we know not why the insurer on freight is not liable for this loss.

If the ship-owner is compelled by a peril insured against to transship his goods as the only way of earning his freight, the cost of doing so is a loss of so much freight, for which the insurers on freight should be answerable. Hence it has been held that, if the goods cannot be sent forward at less than the whole freight which would be earned, this is a total loss of freight.²

¹ *Hugg et al. v. Augusta Ins. & Banking Co.*, 7 How. 595, was the case of an insurance on "freight of the bark Margaret Hugg at and from Baltimore to Rio Janeiro, and back to Havana or Matanzas," &c. A quantity of jerked beef was shipped on board at Montevideo, for Havana. The beef was seriously injured by the ship encountering a storm, getting grounded, &c. A part of the beef was thrown overboard, and a part landed at Nassau in a very damaged condition. This part was there sold. Mr. Justice Nelson, in delivering the opinion of the court, says: "If it was for the interest of the insured and

insurers of the cargo that it should have been so sold, still the plaintiffs are not entitled to recover as for a total loss of freight, provided they could have transshipped the portion sold in specie to the port of destination." So in case of *Bradhurst v. Col. Ins. Co.*, 9 Johns. 17, it was held, in an action of insurance on freight, that if the master or ship-owner neglects to forward the goods by another vessel from a port of necessity, when he has it in his power to do so, in consequence of which the freight is lost, the insurer is not liable.

² *Willard v. Millers' & Manuf. Ins. Co.*, 24 Mo. 561. The steamboat Cata-

If the cost of transshipment exceeds the whole freight, the insurers are liable only for the freight they insure. The shippers of the goods are, however, liable for the excess. And then it may be a question whether the insurers on the goods are not liable for this loss.* It cannot be said that the law on this point is conclusively settled. But there are cases which would lead to the conclusion that the insurers on the goods are liable for what the shippers pay for this excess.¹ In a recent case, the action was brought to recover a balance of \$1,000 for freight on a cargo of ice shipped by the defendants at Richmond, Me., for Mobile, Ala., on board of plaintiff's vessel. The vessel, while prosecuting her voyage, lost her foremast, and suffered other damages which rendered it necessary for her to put into New York for repairs, which she did May 28, 1866. In making the repairs it became necessary to take out the old, and put in a new mast. By admitting the air into the hole where the mast was taken out, some of the ice melted, and also by the delay occasioned by putting into New York for repairs. In an ordinary voyage from Richmond to Mobile a cargo of ice would not usually waste more than twenty-five per cent; in this case there was only about fifty per cent delivered. The court held it to be a case of partial loss on freight.²

ract, on a voyage from St. Louis to New Orleans, had her freight-list insured against a "total loss only." The vessel met with a disaster on the voyage, was rendered totally unfit to transport the cargo, and could not be repaired in a reasonable time to do so. It was shown that the cargo could not be sent forward at any less rate than that at which the Cataract had agreed to take it. The court held the loss to be a total one, within the meaning of the policy.

¹ In *Shipton v. Thornton*, 9 Ad. & Ell. 336, 337, Lord Denman, C.J., says: "What if the transshipment can only be effected at a higher than the original rate of freight, which party is to stand that loss? By the French Ordinance, and the Code de Commerce, and according to the decisions in America, the ship-owner is entitled to charge the

cargo with the increased freight, and as a consequence of that rule it becomes an average loss, and, in case of an insurance, must be made good by the insurers. Emerigon, *Traité des Assur.* ch. xii. § 16 (a), Code de Com. 350 (b)." A similar decision was held in *Searle v. Scovell*, 4 Johns. Ch. 218, to the effect that the cargo is chargeable with the increase of freight arising from the charter of the new ship. The position in the text was definitely decided in the case of *Dodge v. Union Mar. Ins. Co.*, 17 Mass. 470. Under the same circumstances, a like decision was rendered in *Mumford v. Commercial Ins. Co.*, 5 Johns. 262. But see, *contra*, *Shultz v. O. Ins. Co.*, 1 B. Monr. 336.

² *Libby v. Gage*. This case was decided by the Supreme Court of Massa-

SECTION IV.—*Of the Adjustment of Partial Loss.*

A PARTIAL loss is usually adjusted at the port of destination. There is not the same reason for this as in a case of general average, because partial loss gives no claim for contribution on property which may not be within reach elsewhere than at the port of destination. Still it is obvious that, in most cases, the facts on which the adjustment must be founded may be more easily and accurately ascertained at that port than elsewhere. But the adjustment of a partial loss on the ship is not unfrequently delayed until the return of the ship to the home port, especially if the insurance was effected there; and this is sometimes done in a case of partial loss of goods.

There is a radical difference between fire insurance and marine insurance in respect to the adjustment of a partial loss. Under a fire policy, the insurers are held for the whole amount of the loss, up to the limit of the amount insured. In a marine policy, it is always considered that, if the insurance covers only a part of the value of the property insured, the insured stands as his own insurer as to the remainder. The insurers are therefore liable for only that part or proportion of the loss which the amount they have insured is of the value of the whole property insured and at risk. This is equally true whether the property or interest be

chusetts in December, 1867. The full decision has not been published. The rescript sent down to the Superior Court was as follows: "The contract of affreightment admissible, the freight being payable by the ton. The loss of ice by waste during delay in the port of repair or on the previous and subsequent voyage was natural waste, which was at the risk of the owner of the cargo, and did not affect the ship-owner's claim for freight. But the diminution in both, from necessary exposure in order to repair injuries which the ship had suffered from perils of the sea, proportionately reduces the freight due. As the waste on the voyage from the

port of departure to the port of repair did not affect the claim for freight, the cargo is to be estimated at the latter port as if it had still been 406 tons complete; then such proportion of that number of tons as the amount of ice melted and lost by the opening of the hole for necessary repairs of the ship bears to the quantity on board when such repairs were begun is to be deducted from the whole number of 406 tons; and on the residue so computed, inasmuch as no further deduction is to be made for waste on the completion of the voyage, freight is payable at the stipulated rate of \$ 7.50 per ton." The case was sent to an assessor.

valued in the policy or left open. If the property insured be valued in the policy, that valuation is as we have seen conclusive, unless it be set aside as fraudulent or grossly excessive. If it be not valued, then the value must be ascertained. This inquiry is often difficult, especially as to the ship; and this difficulty is one of the causes which make the great majority of policies on ships valued policies, both in England and in this country.

A. Of the Adjustment of a Partial Loss on the Ship.

If the policy be on the ship and is not valued, her actual value or worth to the owner at the port from which the voyage commences is taken as the basis of this adjustment. And this value includes outfits, stores, and money advanced for wages, premium, and costs of insurance.

We have seen that, from the actual cost of repair, one third is deducted, new for old. Mr. Arnould seems to limit this deduction to the case where the damage has been repaired, and its actual cost thus ascertained.¹ It is obvious that, in nearly all cases where the loss is not so great and the repair required so expensive as to justify abandonment and constitute a constructive total loss, the repairs will be made; and, if made, the actual cost is ascertained, and no estimate is necessary. But in this country the one third is deducted in a case of constructive total loss, by reason of the phrase universally used, that there shall be no abandonment as for a total loss, by reason of sea damage, unless the damage amount to more than fifty per cent, estimated as for a partial loss. In the great majority of these cases, this estimate is made on the reports of surveyors or on similar evidence, because the ship is not actually repaired. And we cannot doubt that the same deduction would be made in a case of partial loss without actual repair, when the cost could be ascertained only by surveys and estimates.

Where the ship has suffered a partial loss and afterwards a total loss, the partial loss not having been repaired, here no estimates

¹ 2 Arnould on Ins. 983. The language is: "If the damage done to the ship has not been repaired, the only mode of ascertaining its amount is by the estimate of surveyors. Where, however, the damage has been repaired, the established mode of estimating its amount is to deduct one third from the whole expense both of labor and materials which the repairs have cost, and to assess the damage at the remaining two thirds."

come in ; claim for the total loss exhausts the liability of the insurers. But if the partial loss has been actually repaired, and at a subsequent time a total loss of the repaired ship takes place, the insured may recover (where the policy contains no especial clause forbidding this) for the partial loss in addition to the total loss.¹

If the ship be valued in two different policies, at two different values, we have seen that the assured, claiming for a total loss under one policy, is not limited to the amount at which he has valued his ship in another policy ; and the same rule has been applied where the claim was for a partial loss.²

¹ *Le Cheminant v. Pearson*, 4 Taunt. 367, was an action upon a policy of insurance at and from Jersey to a port or ports in Norway, there in port and back to London. The ship sailed December 3d, and was by a peril of the sea damaged to the amount of £337 ; and the declaration averred this loss, and that the assured labored and travailed to the amount of £337. Afterwards the ship was captured. This action was brought to recover, not only the entire loss insured, but a proportion of the £337. *Mansfield, C. J.*, says : " As to another point respecting the double loss. In practice I know of cases in the Court of King's Bench where such expenses have been recovered as an average loss, without making any distinction whether it was recoverable as an average loss from damage repaired, or within the words of the permission 'to labor, travail,' &c. ; and as no such distinction has been made, we find it safer to adhere to the practice which has obtained, and to call it all average damage." *Stewart v. Steele*, 5 Scott, N. R. 927. Assumpsit on a policy of insurance. A vessel sailed from Calcutta for England, and was injured by an accidental collision with a steam vessel. She returned,

and underwent repair, sailed again, and was obliged to return. Her wales were removed for the purpose of examining her. On examination, she was found so defective as to render it inexpedient to repair her. She was sold as she lay. Plaintiff claimed for an average and a total loss. Latter negatived, former allowed. In *Jumel v. Mar. Ins. Co.*, 7 Johns. 412, a vessel was insured from New York to Bordeaux, and at and from Bordeaux to New York. The vessel on her return voyage was captured, January, 1808, and carried into England. On 1st June, 1808, the insured abandoned. The correspondents of the insured, at the request of the master, put in a claim for the assured as owners of vessel and cargo. The vessel was condemned and cargo restored in March, 1808. Both parties appealed, and finally withdrew their appeals, and a compromise was effected between master and captors. The court held that the insured were entitled to recover for a total loss, and also for all the expenses incurred in endeavoring to recover the property prior to composition between master and captors.

² *Bousfield v. Barnes*, 4 Campb. 228.

B. *Of the Adjustment of a Partial Loss on Goods.*

We have already seen that the value of the property insured, if it be not fixed by a valuation, must be ascertained, in order to determine how much the insurer has to pay in case of partial loss; for, if he insured less than the whole value, he pays in the same proportion, less than the whole amount of loss. But the value to be thus ascertained is the value when the insurance was made and the premium was paid, or became payable; and this is the value of the goods when the ship sailed. And this value is the prime cost of the goods, with all the costs and expenses of getting them on board, whether they were laden on board at the home port or at a foreign port.¹ Hence this value cannot be affected in any way by the market price at the port of destination. The principle of indemnity might seem to require a different rule. If two thirds of the goods arrive safely and sell for twice their cost, the owner, in losing one third of his goods, loses thrice the cost of that third. If the two thirds sell for half their cost, the owner has lost but half the cost of the third that is lost. The answer to this is, that the increase or diminution of value by the transportation affects only the profits which the owner makes or intends to make, by shipping the goods; and profits constitute a distinct insurable interest, independently of the goods.² Undoubtedly, as we have repeatedly seen, profits may be insured under that name, or included in a valuation, if it is on goods and is made high enough for that purpose. But it is certain that they cannot be permitted to increase or diminish the value of goods, when that is estimated on an adjustment for the purpose of ascertaining what proportion of their value was insured.

So, too, the selling price at the port of destination covers the

¹ *Coffin v. Newburyport Mar. Ins. Co.*, 9 Mass. 436. Cotton was purchased at the Cape of Good Hope, with intention to sell the same at the Isle of France, to which place it was carried. While there it was determined to bring it to the United States, and for that purpose it was repacked and invoiced at its value at the Isle of France, which was higher than its cost at the Cape. It was captured and condemned on the homeward voyage. The underwriters were held liable for the value as invoiced. See also *Usher v. Noble*, 12 East, 639; *Gahn v. Broome*, 1 Johns. Ca. 120; *Minturn v. Col. Ins. Co.*, 10 Johns. 273; *Le Roy v. United Ins. Co.*, 7 Johns. 343.

² *Benecké, Pr. of Indem.* 3; *Stevens on Average* (Phillips's ed.) 85.

freight, which is itself a distinct insurable interest, to be insured by itself or included in a valuation of the ship, but is not to be taken into consideration in determining how much of the value of the goods is insured.

All this applies only to open policies. If the valuation of the goods be intended to include the expected profits, and is known to be so intended, the insurers are bound by it, and pay the same proportion or aliquot part of this value that the amount he insures is of that value. And so it is if the valuation of the ship includes the freight.

As we have seen, if all the goods arrive, and some of them are sea damaged and some of them are not, the difference in the prices they bring determines the *proportion* of the value insured which is lost. But these prices have no effect upon the value of the goods when insured, and that only is the value to be ascertained in order to know what part of their value was insured by the insurer, and what part by the owner.

To ascertain what proportion of the value of goods is lost by sea damage, it seems now to be settled law in England, that the gross sales of the sound goods are to be compared with the gross sales of the damaged goods, and not the net sales with the net sales.¹ Arnould says, that since the case of *Johnson v. Hudden*,

¹ *Johnson v. Sheddon*, 2 East, 581. Opinion by *Laurence, J.*: "This is a motion for a new trial of an action brought against the defendant, an underwriter, on goods on board a ship called the *Caroline*, from Sicily from Hamburg, to recover a partial loss sustained by the plaintiff, by reason of the sea-water having damaged a cargo of brimstone and sumach; and upon a calculation by Mr. Oliphant, to whom it was referred by the parties to ascertain the loss sustained, it has been settled after the rate of £76 7s. 4d. per cent. And the ground on which the new trial has been moved for is, that Mr. Oliphant has proceeded in his calculation upon a mistake, inasmuch as, in estimating the loss, he has taken for his

foundation the difference between the *net* produce of what the goods have produced and what they would have produced if sound, instead of the difference between their respective *gross* produces. Upon the fullest consideration that we have been able to give this question, my brothers *Grose* and *Le Blanc* agree with me in thinking there should be a new trial, and that the calculation is wrong. Some points are agreed on both sides; viz. that the loss is to be estimated by the rule laid down in *Lewis v. Rucker*, 2 Burr. 1170, that the underwriter is not to be subjected to the fluctuation of the market; that the loss for which the underwriter is responsible is that which arises from the deterioration of the commodity by

which we give in our notes, "this is invariably acted on in practice as the true rule of adjustment."¹ We believe the practice to be the same in this country.² This rule is founded on the supposition, that the full market price (by which is meant the price the owner sells at after paying freight, duty, and all charges of landing) of the sound goods compared with that of the damaged goods measures accurately the deterioration of the goods, or diminution in their value by the damage. Nor is it an objection to this, that the gross sales include a duty, if, as is common if not universal, the duty is the same on the sound and the damaged goods.

If, however, articles which are several in their nature are insured in the same policy, and each suffers a partial loss under the policy, and this loss is determined by a sale, the loss must be adjusted separately on each. Sometimes there is a clause providing for this. If there be not, the law provides for it; as otherwise the insurer would be affected by the state of the markets,

sea damage; and that he is not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. In *Lewis v. Rucker*, Lord *Mansfield* says: "Where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantum of damage; but if you can fix whether it be a third, a fourth, or a fifth worse, the damage is fixed to a mathematical certainty"; and this, he says, is to be done "by the price at the port of delivery." From hence it follows, that whatever price at the port of delivery ascertains whether a commodity be a third, fourth, or fifth the worse, is a price to which he alludes. And this deterioration will be universally ascertained by the price given by the consumer or the purchaser, after all charges have been paid by the person of whom he purchases; or, in other words, by the difference of the

gross produce, and not by the difference of the net produce." The same point was determined in the Court of Common Pleas, in the Michaelmas term following, *Hurry v. Royal Exc. Ass. Co.*, 3 B. & P. 308. As to the rule for estimating the loss of goods insured by an open policy, see *Usher v. Noble*, 12 East, 639. See also remarks on *Johnson v. Sheddon*, in *Stevens and Bencké on Av.* (Phillips's ed.) 243, 342, and note by Mr. Phillips, on p. 360.

¹ 2 Arnould on Ins. *968.

² It was held in *Lawrence v. N. Y. Ins. Co.*, 3 Johns. Ca. 217, that "the rule by which to calculate a partial loss is case of a policy of insurance on goods arising from sea damage is the difference between the gross proceeds of the sound and damaged; that is, a proportion of the prime cost of the damaged goods corresponding to the proportion of the diminution of the gross proceeds thereof." See also 3 Kent, Com. 337.

unless the several goods had risen or fallen in their market price in precisely the same degree,—a fact in itself improbable.¹

The sound and damaged goods may be, and often are, sold at the same auction, but separately. It is then possible that the damaged goods are sold for less than they otherwise would bring, because the package is opened or the assortment disturbed. But the insurers are not answerable for this, as it is not the direct effect of sea damage, but a consequential and remote effect.² This rule does not apply, or rather this distinction is not made, as to the charges and expenses of the sale by auction, brokerage, commission, &c., when that sale is made, as it usually is, for the purpose of measuring the sea damage. These are considered as necessary charges. They are added by the adjuster to the amount of the loss, and the whole apportioned upon the insurers.³

If a ship, at an intermediate port, finds a part of its cargo so injured by sea damage, that it is unfit to be carried on, it may be sold at that port. That loss is then adjusted as a loss with salvage. That is, the amount of loss is the difference between the prime cost of the goods and the proceeds of the sales. From these proceeds are deducted the charges and whatever freight may be due upon the goods.

If only *pro rata* freight is earned, and the earning of the whole freight is prevented by a peril insured against, that part of

¹ Ocean Ins. Co. v. Carrington, 3 Ct. 357. A requested an insurance on "26 horses, valued at \$2,200, and on 20 oxen, valued at \$800." The policy was filled out "on 46 head of horses and oxen, valued at \$3,000." *Hosmer*, Ch. J., in his opinion, says: "The plaintiffs (Ins. Co.) have insisted that, in the event of a partial loss, the insured would derive no benefit from a distinct and separate valuation in the policy; in other words, as all policies are open to adjust a particular loss, that the result in every case must be the same. Nothing can be more incorrect. In the event of an aggregate valuation, the partial loss is compared with the aggregate sum; but in the

case of a separate valuation of the property insured, the proportion of loss is estimated on the separate value."

² Stevens on Average, 155-158, holds the same view. So, too, Benecké on Indemnity, 436.

³ Muir v. Unit. Ins. Co., 1 Caines, *54. One of the charges contended for in this case by the insured was the amount of auction duties. The court held that, in this particular instance, the auction charges did not come within the policy. But they say: "Had the sale at auction been to ascertain the injury the cargo had received, and limited to such parts as were damaged, it would have been a reasonable charge."

it which is not earned is a partial loss. This *pro rata* freight may be earned by the acceptance of the goods by the shipper at an intermediate port, and may be paid by him. Then the partial loss is determined by deducting from the whole freight the part earned and received, and the balance is adjusted as a partial loss.

If the goods are actually transshipped by the owner or master, what he pays for this transshipment is what he loses, for by this payment he earns his whole freight. But if the goods are not actually transshipped, nor offered, received, and paid for as in the case first supposed, then the adjuster deducts from the whole, and charges as partial loss the estimated cost of forwarding the goods.¹

One way in which the adjuster may estimate this is by the geographical proportion of distance, which was the earlier mode in England;² and it has been applied in this country, but only because it seemed to the court to be the juster method in that case.³ The other may be called the commercial way. The principle on which it is founded is, that the shipper pays the ship-owner for all the benefit he has received by the amount of transportation of the cargo by the ship. And the common way of ascertaining this is to determine what it will cost the shipper to forward his goods, and he charges the owner with this, or, in other words, deducts it from the whole freight, and pays the owner the difference. This difference is the partial loss of the owner. This we suppose to be the prevailing method of adjusting this partial loss on freight in this country.⁴

¹ *Bork v. Norton*, 2 McLean's C. C. 423.

² *Luke v. Lyde*, 2 Burr. 882. Here the master had come seventeen days of his voyage, and was within four days of the destined port, when the accident happened. Lord *Mansfield* decided he ought to be paid his freight for $\frac{1}{17}$ parts of the full voyage.

³ See *Robinson v. Marine Ins. Co.*, 2 Johns. 323, and cases there cited from 2 Caines, 21, and 1 Johns. 27.

⁴ *Coffin v. Storer*, 5 Mass. 251. A vessel was wrecked on Cape Cod, on a voyage from Demarara to Biddeford. *Parsons*, Ch. J., said in the course of his

opinion: "The loss on freight must be decided, not by the proportion in time of sailing, but by the respective rates of freight. Let the average from Demarara to Biddeford, if she had not been wrecked, be ascertained, and deduct therefrom the expense of bringing the goods on."

The rule adopted in *Mar. Ins. Co. v. Lenox*, cited in 2 Johns. 323, was to ascertain how much of the voyage had been performed, not when the ship first encountered the peril and was interrupted in her course, but when the goods had arrived at the intermediate port, because *that* is the extent of the

Arnould speaks of this mode of adjusting partial loss of freight, by deducting expense of forwarding, as the way of "adjusting it in the United States as a salvage loss"; but he suggests no other way prevailing in England.¹

In an English case, where in a continuing policy covering cargoes in many vessels for a certain time, a partial loss on goods in one of them occurring, the question arose, whether the loss should be adjusted by estimating the percentage on all the goods carried under the policy during the whole time, or on the value of all the goods actually at risk under the policy, when the loss took place. And the last method was adopted.²

What we have already said of the force and effect of an adjustment is as applicable, or very nearly as applicable, to an adjustment of a partial loss as to one of general average. Whatever difference there is arises from the fact that here there is no contribution, and therefore the adjustment is not complicated by considering and determining the rights of many parties who may live out of each other's reach. And any material change in the relation of any one to the rest involves, or may involve, a change in all.

It need hardly be said that an adjustment, like every other bargain or agreement effected by fraud,¹ or founded on material

voyage performed as it respects the interest of the shipper. The court, in 2 Johns. 323, expressly say that it is more just than the one they adopt, but that in the case under consideration they had not sufficient data given by which to apply it.

The case of *Luke v. Lyde*, 2 Burr, 882, was first understood in this country to justify the claim of a *pro rata* freight, whether there was a voluntary or a compulsive acceptance of the goods at an intermediate port, by the owner of them or his agent. But beginning with *Mar. Ins. Co. v. Unit. Ins. Co.*, 9 Johns. 186, it was held to apply only to a voluntary, unequivocal, unconditional acceptance, and only in such a case was there a right to freight *pro rata*. This doctrine is the prevailing one now, and was asserted in *Armroyd*

v. Union Ins. Co., 3 Binn. 437; *Hurtin v. Union Ins. Co.*, 1 Wash. C. C. 530; *Caze v. Balt. Ins. Co.*, 7 Cranch, 358; *Sampayo v. Salter*, 1 Mason, 43; *Catlett v. Col. Ins. Co.*, 12 Wheat. 383. Corresponding with the change in application of the principle in *Luke v. Lyde* is a change in the rule of adjustment, as shown in the preceding note, and the cases cited at the beginning of this. The rule stated in the text, as in force generally in this country, is stated unqualifiedly by Mr. Arnould in his work on Insurance, vol. 2, p. 991, to be the rule here adopted. Nor do we know certainly of any other way as prevailing in England.

¹ 2 Arnould on Ins. 991.

² *Crowley v. Cohen*, 3 B. & Ad. 478.

³ In *Herbert v. Champion*, 1 Campb. 134, it was held that an underwriter

mistake² (of fact, not of law³), may be set aside altogether, or opened for correction.

It may, however, be well to remark, that the common principle of denying to new evidence any power to disturb a settled question, if it be cumulative evidence, that is, more of evidence of the same sort and to the same effect as evidence already received and considered, would undoubtedly be applied to any attempt to disturb an adjustment.

Such is the importance of an adjustment, as determining the rights of many parties, that courts are wisely reluctant to admit local usages in reference to any of the material estimates, as of force against the generally accepted principles or rules of the law-merchant.⁴

If, however, instead of a regular adjustment in the customary way, the parties choose to settle their mutual claims or defences themselves, and enter into a compromise for that purpose, this bargain, if not tainted by fraud or voidable through mistake, binds the parties. And where one of two part owners, authorized to insure, and making insurance for both, made a compromise with the insurers, receiving from them his own share under the compro-

who, upon a full disclosure of the facts, has signed his initials to an adjustment on the policy without paying the loss, is not precluded afterwards in an action against him from taking advantage of circumstances with which he had been made acquainted before signing the adjustment, which in this case were fraudulent. See also *Haigh v. De la Cour*, 3 Campb. 319. In *Faugier v. Hallett*, 2 Johns. Ca. 238, it was held that "an adjustment of loss indorsed on a policy of insurance, and signed by the insurer, is not conclusive; and the party may show that it was made on the misrepresentation of the insured; and whether such misrepresentation proceeded from design or mistake makes no difference."

² *Faugier v. Hallett*, 2 Johns. Ca. 238, *supra*.

³ See *Bilbie v. Lumley*, 2 East, 469, overruling *Rogers v. Maylor*, cited

Park on Ins. 267; *Dow v. Smith*, 1 Caines, 32.

⁴ *Rankin v. Am. Ins. Co.*, 1 Hall, N. Y., 6, 19, action on policy of insurance, opinion by *Oakley, J.*: "In the present case, the judge was called upon to hear evidence of a usage controlling the construction of the policy, so as to render necessary the production of a particular document as a part of the preliminary proof. If such evidence had been admitted, counter-evidence on the part of the plaintiffs to repel the usage must have been gone into, and thus the judge would have been drawn into the trial of a fact, instead of confining himself to the decision of the law as arising upon the state of the proof as exhibited by the plaintiffs. This, in my judgment, is clearly inadmissible. The usage in question, if it could avail the defendants at all, would be a bar to the

mise, and thereupon released the insurers from all claims and demands under the policy, it was held that the other part owner might elect to consider the compromise as made for the benefit of both part owners, and on this ground recover from the part owner making it the proportion which would be due to him had the money paid under the compromise been paid to one part owner for both; or he might say the other part owner had no right to make the compromise and discharge the insurers, and on that ground recover from the compromising part owner the amount which he could have claimed from the insurers, had no compromise been made.¹

plaintiffs' right of action; and in this view it was also offered to be proved at the trial. The judge again properly rejected it. The rule as to the admission of usage to control the construction of a policy seems to be that it may be resorted to to fix the sense of particular terms in the instrument where they have acquired a peculiar meaning, as between the assurers and the assured.

Coit v. Conn. Ins. Co., 7 Johns. 389. In this light its effect is, not to alter the contract of the parties, but merely to ascertain what that contract is. But it is well settled that a usage can never be set up to affect or vary an express agreement, nor to contradict a rule of law. *Frith v. Barker*, 2 Johns. 335; *Homer v. Dorr*, 10 Mass. 26."

¹ *Briggs v. Coll*, 5 Met. 504.

CHAPTER VIII.

OF AGENTS.

SECTION I. — *Of Insurance Agency in General.*

THE contract of insurance may, in every respect and in all its parts, be effected by agents; whose acts bind their principals in the same way as in other business transactions.

It is more common for the insured to act by an agent, than for the insurers; and more common for insurers against fire than for marine insurers. But insurers against perils of the sea sometimes have their agents to originate, or even to make their contracts; and very frequently act under their own contracts, in case of actual or alleged loss, by agents.

There are no principles which belong exclusively to agency in insurance matters; none, that is, which are not recognized as a part of the general law of agency. But there are some peculiarities in the application of these principles, and it is rather of these that we propose to speak in the present chapter.

Much that belongs to this topic has indeed been already stated, by anticipation, while considering other subjects. Thus, we have already treated of the implied authority to act as agents, in effecting insurance, which persons may have because of their relations to the owners of the property; for example, as ships' husbands, or as joint owners, or as copartners.

We have also considered quite fully the subject of ratification of an authority, either by bringing suit or otherwise. Also, representations or concealments by agents. Also, the agency for the insurers cast upon the insured or his master or servants by a loss and abandonment.

In this chapter, after a few remarks on these and similar topics, we propose to consider in separate sections, first, the powers of agents; secondly, the duties of agents; thirdly, the rights of agents; fourthly, the law concerning voluntary agents.

We remark in general, and rather that these universal princi-

ples may be kept in mind than because of their especial relation to insurance, that no agreement by, or act of, an agent binds his principal, unless the agent acted therein within the scope of his authority, whether that were express or implied. Next, that any lawful act purporting to be done by an agent for a principal may be ratified by that principal, and, being so ratified, has the same effect as if done by previous authority.¹ And even if the contract of insurance violates a statute, and a loss occurs under it which the insurers pay to the agent, he must pay it over to his principal, if the insurers have not notified him to hold it as theirs, in which case it does not rightly belong to his principal.²

The courts of England differ from those of this country, in regard to the rights of the insurers, when a contract of insurance is made by an agent. There, they seem to permit the insurers, in the settlement of the loss, to set off all claims against the agent; and to consider the principal only as subrogated to the rights of the agent, without any enlargement whatever, unless there be some contrary provision in the policy.³ Here, if the insurance is, in effect (whatever be its form), made by A for the benefit of B, the insurers can set off against B's claims only their claims against B himself.⁴ The peculiar view of the English courts seems to be derived, in some degree at least, from the peculiar usages of their country in respect to insurance brokerage. There, it would appear, nearly all insurance business is managed by insurance brokers, who constitute a regular profession, and are as distinctly recognized in the law as well as in practice as the insurers are. As each insurance company is very likely to have many contracts effected by the same broker, it seems that both usage and law

¹ Thus, as we have already seen, *ante*, vol. 1, p. 49, n. 7, the owner of property may adopt an insurance effected by an agent. See also *Sideways v. Todd*, 2 Stark. 400.

² *Tennant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, Ib. 296. In *Edgar v. Fowler*, 3 East, 222, the insured had not actually paid the premium on an illegal contract of insurance over to the defendants, who were insurance brokers, but the latter had credited the

insurers with the amount, and were afterwards notified not to pay it over to the underwriters. It was held that the latter could not bring an action for money had and received, the contract being illegal, and the money not having been actually paid over. See also *Booth v. Hodgson*, 6 T. R. 405.

³ See 1 Arnould, Ins. 108-142; *Gibson v. Winter*, 5 B. & Ad. 96; *Wilkinson v. Lindo*, 7 M. & W. 81.

⁴ See *ante*, vol. 1, p. 504, n. 5.

permit them to regard the broker as in some degree the principal. They usually know only him, and look to him as their security; and the broker is considered as the agent of both parties.¹

SECTION II. — *Of the Powers of Agents.*

THE first rule is, that a special agent cannot exceed his authority, however that be conferred.

Thus, if the act of incorporation of a company provides that the business shall be conducted in a particular manner, and that the concurrence of a certain number of officers is necessary to make an act valid, the mode prescribed must be followed.² And generally, if an agent has specific duties to perform, he cannot bind his principal by acts not within the scope of such duties.³ But a general agent may bind his principal by an act within the scope of his authority, although he has private instructions which limit his power, if these instructions are not known to the insured.⁴

¹ See 1 Arnould, Ins. 108 - 142.

² See *ante*, vol. 1, p. 35, n. 1, Beatty v. Marine Ins. Co., 2 Johns. 109.

³ Thus, an agent of Lloyds' in a foreign port has no power to bind the company by a certificate of the amount of damage, and such certificate is therefore not admissible in evidence. *Drake v. Marryat*, 1 B. & C. 473. And in *Jellinghaus v. New York Ins. Co.*, 6 Duer, 1, it was held that the burden was on the insured to show that the vice-president of an insurance company had authority to bind the company by accepting goods. And the secretary of a railroad company has no authority to bind it. *Williams v. Chester & Holyhead Railway Co.*, 5 Eng. L. & Eq. 497. Nor has the treasurer of a corporation any right to release a claim which belongs to the corporation. *E. Carver Co. v. Manufacturers' Ins. Co.*, 6 Gray, 214; *Dedham Institution for Savings v. Slack*, 6 Cush. 408.

⁴ *Lightbody v. North American Ins. Co.*, 23 Wend. 18. In *McEwen v. Montgomery County Mutual Ins. Co.*, 5 Hill, 101, notice of a prior insurance given to a travelling agent of the insurer, whose duty it was to solicit insurances, make surveys, and receive applications, was held to be notice to the insurer. See also *Sexton v. Montgomery County Mutual Ins. Co.*, 9 Barb. 191. And notice to an agent of an incumbrance on the property insured is notice to the insurer. *Masters v. Madison County Mutual Ins. Co.*, 11 Barb. 624. In *Mellen v. Hamilton F. Ins. Co.*, 5 Duer, 101, it was held, that the knowledge of a further insurance by an insurance broker, who procured the policy for the assignor of the plaintiff from the defendants, could not be considered as knowledge to them, there being no proof of his being such a general agent as would make them liable for his acts of knowledge. And in *Vose*

If an agent, having sufficient authority for his acts, fails to report to his principals (being an insurance company) facts or information which his duty to them required of him, this does not invalidate his acts as their agent, so far as the insured are concerned.¹

Nor has an agent of insurers any implied authority to annul or dispense with any specific rule of the insurers made known to the insured. Thus, if the policy requires that certain facts (as, for example, subsequent insurance) should be indorsed on the policy, an assurance by the agent of the company, that his own entry of it on his own records will do as well, has been held not to bind the insurers, if the entry were not actually made on the policy.²

The second rule may be said to be, that, whenever the authority of an agent arises from a necessity, it is measured by that necessity.

As to authority derived from some other relation besides that of sole ownership, it may be said, in general, that wherever any actual interest in property vests in any person, by contract or by operation of law, or even officially, it carries with it the power of causing the property to be insured, either as agent or as principal, as the case may be.³

An agent is not only limited by the terms of his authority, or by the necessity from which it springs, but also by the general principles of trust. Thus, an agent, who has any charge of or in respect to insured property, if he be an agent to sell, cannot buy; and if he be an agent to buy, he cannot be interested in the sale.⁴

An authority carries with it, in general, power to do all lawful acts necessary to the execution of the authority. Thus, an agent of an insurance company who is intrusted with printed forms of policies, which are signed by the officers of the company, and are

v. Eagle Life & Health Ins. Co., 6 Cush. 42, 49, it was held that the knowledge of an insurance agent, whose duty it was merely to receive the application and forward it to the company, of the condition of the health of the assured in a life policy, was not sufficient to avoid the effect of a misrepresentation by the assured on the subject of his health.

¹ *Gloucester Manuf. Co. v. Howard F. Ins. Co.*, 5 Gray, 497. See also *Wing v. Harvey*, 5 De G. M. & G. 265, 27 Eng. L. & Eq. 140.

² *Worcester Bank v. Hartford F. Ins. Co.*, 11 Cush. 265.

³ See *ante*, vol. 1, ch. on Insurable Interest.

⁴ See *ante*, p. 192, n. 4.

to be filled out, countersigned, and issued by him, has authority to add to the policy before it is delivered a memorandum that the property insured is in course of construction.¹ And in one case, in the absence of any proof of any limitation of the power of the agent, it was held that the agent, after an open policy of insurance declared to be "on property on board vessel or vessels, as per indorsement to be made thereon," had been signed, might agree that the policy should cover a number of bales of cotton on shore at New Orleans from date of storage until shipped.² The power to effect insurance for a principal carries with it the power to sign a premium note for the principal; and generally the principal may be held liable for such a premium. But he cannot be sued on the note itself, if that be signed by the agent in his own name only, and without words indicating that he signs as agent.³

So, it is held, that the authority to effect insurance for the insurers carries with it the authority to adjust, or agree to an adjustment of, a loss.⁴ And that the authority to make a contract of insurance in behalf of the insured gives the agent power to make an abandonment.⁵

¹ Gloucester Manuf. Co. v. Howard F. Ins. Co., 5 Gray, 497.

² Kennebec Co. v. Augusta Ins. & Banking Co., 6 Gray, 204.

³ See *ante*, vol. 1, ch. 15, § 1, pp. 502, 504.

⁴ Richardson v. Anderson, 1 Campb. 43, n. In Goodson v. Brooks, 4 Campb. 163, the agent who subscribed the policy, on the happening of a loss, agreed to refer the matter to arbitrators. There was no direct proof of his authority to agree to the reference; but it appeared that he was in the habit of settling losses for the defendant, which the latter afterwards paid. It was held that this was sufficient evidence of agency to render the award binding on the insurer. But an insurance broker has no implied authority to pay a loss, due from the underwriter who employs him, to the assured. Bell v. Auldjo, 4 Doug. 48.

⁵ Cassidy v. Louisiana State Ins. Co.,

18 Mart. La. 421; Parker v. Towers, 2 Browne, App. 80. This point was also expressly decided in Chesapeake Ins. Co. v. Stark, 6 Cranch, 268, where the jury found a special verdict that the insurance was effected by the agent of the insured, and that the same agent abandoned "for the plaintiff." Marshall, C. J., said: "The agent who made the insurance might certainly be credited, and in transactions of this kind always is credited, when he declares that, by order of his principal, he abandons to the underwriters. In this case the jury find that the abandonment was made for the plaintiff; and this finding establishes that fact." In a case where a part owner, insured in his own name for the benefit of whom it concerned, on a loss having taken place, abandoned the property by a letter signed with his own name only, and not stating what interest was abandoned, it was held

It has been held that if an agent is authorized to make a contract of insurance, to take effect from the time when the premium shall be paid and shall be received at the office of the insurance company, provided the office shall recognize the rate of premium, and be otherwise satisfied with the risk, then if the usual premium is paid to the agent, and he takes the risk, the company are liable although the premium is not received by them before the loss; and that they cannot arbitrarily be dissatisfied with the risk or with the premium.¹ But generally the authority of an agent does not empower him to issue a policy when the property has been destroyed while the application for the insurance was on its way to the agent from the owner of the property.² The authority of an agent to issue a policy is to be determined by the rules of agency applicable to all other contracts. As a general rule, the instrument under which the agent acts need not be produced, and his agency may be inferred from the fact that the underwriter has paid losses without objection on other policies issued by him.³

If the insured delivers up the policy to an insurance broker for the purpose of obtaining the amount due on it from the underwriter, and the latter pays the sum over to the broker, the broker thereupon becomes the debtor of the insured, and the underwriter is discharged.⁴ But the question has arisen, whether the fact of the account being settled between the broker and the underwriter by the broker debiting the underwriter with the amount of the loss, and crediting the insured with the same, and the underwriter crediting the broker with the amount, is a sufficient payment to the broker. It has been held that, if the underwriter's name is not struck off the policy, he is still liable, notwithstanding this transfer on the books of the parties.⁵ And it

that he was duly authorized, *prima facie*, to make the abandonment for himself and those for whom the insurance was made in his name, and that, as there was no evidence of dissent on their part, the abandonment was sufficient. *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191. See also *Hunt v. Royal Exch. Ass. Co.*, 5 M. & S. 47.

¹ *Perkins v. Washington Ins. Co.*, 4 Cow. 645.

² *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421.

³ *Haughton v. Ewbank*, 4 Campb. 88.

⁴ *Scott v. Irving*, 1 B. & Ad. 605. See also *Erick v. Johnson*, 6 Mass. 198.

⁵ *Russell v. Bangley*, 4 B. & Ald. 395; *Todd v. Reid*, 4 B. & Ald. 210; *Jell v. Pratt*, 2 Stark. 67. In *Stewart v. Aberdeen*, 4 M. & W. 211, 224, the case of *Todd v. Reid* being cited, *Parke*,

makes no difference if the name is struck off, if this is done without the assent of the insured.¹ These cases proceeded principally upon the ground that the authority to the agent to receive the amount of the loss gave him only a power to receive it in cash, and that the underwriter was not discharged by merely crediting the broker with the amount; and that no knowledge of any usage to the contrary was brought home to the insured. But there seems to be no good reason why the payment should be required to be made in cash;² and in a case where the party was proved to have known the usage, it was held that he was bound by it.³

As soon as the insurance broker has received credit, in account with the underwriter, for the amount of the loss, it has been held that he is liable to the assured in an action for money had and received.⁴ And he certainly is liable if he receives the acceptance

B., said: "With regard to that case, it certainly is incorrectly reported. I was counsel in the cause, and there was no proof at all of any settlement in account between the broker and the underwriter."

¹ *Bartlett v. Pentland*, 10 B. & C. 760. See also *Scott v. Irving*, 1 B. & Ad. 605.

² In *Stewart v. Aberdein*, 4 M. & W. 211, 218, at the trial *at nisi prius*, Lord Abinger, C. B., expressed his opinion, "that if any one man has to pay another money on account of his principal, and there is money due to him from such other person, it makes no difference to the principal whether there is an interchange of bank-notes, or a mere transfer of accounts from one side to the other, and that it is equally a payment, if it is done without fraud."

³ *Stewart v. Aberdein*, 4 M. & W. 211. Lord Abinger, C. B., in this case, said: "It must not be considered, that by this decision the court means to overrule any case deciding that wherever a principal employs an agent to receive money, and pay it over to him, the

agent does not thereby acquire any authority to pay a demand of his own upon the debtor, by a set-off in account with him. But the court is of opinion, that where an insurance broker or other mercantile agent has been employed to receive money for another, in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied, but it must be understood, that where an account is *bona fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal." See also *Erick v. Johnson*, 6 Mass. 193.

⁴ *Andrew v. Robinson*, 3 Campb. 199. See also *Ovington v. Bell*, 3 Campb. 237.

of the underwriter payable at a date later than that at which the loss would be payable.¹ When a loss is payable at a certain time after the preliminary proofs are presented, it would seem that the underwriter may pay the same to the agent of the assured who is authorized to receive the amount, within the time, and that a revocation of the authority of the agent, subsequent to payment, but before the expiration of the time designated in the policy for the payment would not render the underwriters liable.²

The same person may be the agent of both parties; or, being the general agent of one, he may be made the special agent of the other; and this special agency may be inferred from circumstances. And if a party who desires to be insured employs a person who is agent of the insurers, and so employs him as to make him his agent, he is as responsible for the acts or omissions of such agent in his behalf as he would have been if that person had not been the agent of the other party.³ But generally, in any contract requiring the exercise of judgment and discretion, a person cannot act as the agent of the two parties in interest. Thus, if a person is a director of one company and the agent of another, he cannot as such agent insure with the second any interest belonging to the first company.⁴ A single partner has all the powers which his

¹ *Wilkinson v. Clay*, 6 Taunt. 110, 4 Campb. 171. The broker in this case debited the underwriter with the amount of the loss, and took his acceptance for the balance of the account between them payable at a time subsequent to that when the loss would be payable. It was held that he was liable for money had and received.

² It was so decided in *Scott v. Irving*, 1 B. & Ad. 605; but the court were of a different opinion in *Bethune v. Neilson*, 2 Caines, 139, where it was held that an agent, although in possession of the policy, had no right to receive payment till the time mentioned in the policy had expired.

³ *Smith v. Empire Ins. Co.*, 25 Barb. 497. The parties desiring insurance in this case handed an application to a

person who was the agent of the defendants, for the purpose of receiving and forwarding applications, with the request that he would fill it out subsequently, there being no conveniences for writing there, and forward it. Nothing was said about encumbrances in the application, or by the parties, but the agent made a statement in the application, that there was no encumbrance except one mentioned. It was held that the agent acted as the agent of the insured in filling out the application, and that they were liable for the consequences of his act.

⁴ *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132.

firm, who are agents of an insurance company, have to make a contract of insurance.¹

SECTION III. — *Of the Duties of Agents.*

ANY person undertaking any work for compensation impliedly warrants that he has sufficient knowledge, and will take sufficient care, to do it as it should be done. But this obligation on the part of the agent is affected by circumstances, because it must always be qualified by the rule, that the party employing him cannot demand of him more skill or more care than he had a right to expect. If, therefore, one desiring insurance goes to a professed insurance broker, he has a right to insist upon proper professional skill and reasonable care.² But if he chooses to employ any friend who has only a general mercantile knowledge or even less, he has a right to make such a man his agent, but not a right to demand from him the same skill or the same care that he could expect from one practised in this business and professing to make it his own.

¹ Kennebec Co. v. Augusta Ins. & Banking Co., 6 Gray, 204.

² Thus in *Chapman v. Walton*, 10 Bing. 57, where it was contended that the defendant had not correctly obeyed the orders of the plaintiff, *Tindal*, C. J., said: "The point therefore to be determined is not whether the defendant arrived at a correct conclusion upon reading the letter, but whether upon the occasion in question he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to rest upon this further inquiry, namely, whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For the defendant did not contract that he would bring to the performance of his duty on this occasion an extraordinary degree of skill, but only a reason-

able and ordinary proportion of it." Reasonable skill and ordinary diligence are defined in *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13, 26, as follows: "By reasonable skill is understood such as is ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment; and by ordinary diligence is to be understood that degree of diligence which persons of common prudence are accustomed to use about their own affairs." Thus, if a custom prevailed to transact business in a particular way, an agent would not be liable if he conformed to that custom, although the custom should be afterwards decided to be contrary to law, there being no obligation on the part of the agent to correctly decide dubious points of law. *Pitt v. Yalden*, 4 Burr. 2060; *Baikie v. Chandless*, 3 Campb. 17; *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13.

If a person promises, for a valuable consideration, to effect insurance for another, he is of course liable if he neglects to do so.¹ And the right to require that a party should effect insurance for another, and to hold him liable for not doing it, seems to rest on the same principle, namely, that the owner has, in reason and good faith, a right to consider himself insured. Thus it is said, that this right exists if the owner, when he sends orders to his agent, has effects in that agent's hands, or if he sends or consigns effects, with his orders, or if he has been accustomed to send such orders and find them complied with, and nothing of word or fact has occurred to indicate that this custom will be broken.²

If goods are sold on an order and sent to the vendee, it appears to be the custom in some parts of the country for the vendor to insure them, and, in case of his neglect to do so, it seems that he would be liable to the consignee.³

In any of these cases, or in any case to which a similar principle applies, if the agent fails to make insurance, and the principal suffers loss thereby, he may hold the agent liable therefor.⁴ And it

¹ *Ela v. French*, 11 N. H. 357.

² Per *Buller, J.*, in *Smith v. Lascelles*, 2 T. R. 187. See also *Wallace v. Tellfair*, cited 2 T. R. 188. In *De Tastett v. Crousillat*, 2 Wash. C. C. 132, and in *Morris v. Summerl*, Ib. 203, it was held, that a foreign merchant, who was in the habit of insuring for his correspondent, was liable, if, on receiving an order to insure, he neglected to do so, or did it in a manner different from his orders.

³ *Walsh v. Frank*, 19 Ark. 270. The action in this case was for goods sold and delivered. The defence was, that they never reached the defendant, the consignee, and that the consignor ought to have insured them. It was held, that whether it was the duty of the shipper to insure the goods without an order to do so depended upon the general custom of merchants, unless there was a special custom at the place of shipment, known to the purchaser, which was different from the general one. And it was held, that

knowledge of such general custom might be shown by the previous course of business between the same parties. See also *Shirliff v. Whitfield*, 2 Brev. 71.

⁴ In *Seller v. Work*, 1 Marsh. Ins. 299, where an insurance broker employed another broker at the request of the plaintiff to obtain a policy of insurance, but omitted through inadvertence to deliver to the second broker a letter containing material information, in consequence of which the underwriters were discharged, it was held, that the first broker was liable. So a merchant, who, having accepted an order for insurance, limited the broker to too small a premium, in consequence of which no insurance could be effected, was held liable. *Wallace v. Tellfair*, cited 2 T. R. 188. In *Strong v. High*, 2 Rob. La. 103, an agent who had the general charge of a vessel, and had insured her, was held liable for neglecting to renew the policy when it expired.

has been held in England, that a broker, who represented that he had caused a policy to be made for a party, might be sued by him in trover for that policy, although none were made.¹

If the orders to insure are absolute, the insurance must be effected at any rate; but it seems, in this country, that the agent need not go out of his vicinity, and, if he cannot effect insurance there, he is not bound to do so at all.² The agent is also bound to effect the insurance within a reasonable time.³

If the agent has no particular directions as to the risks to be insured against, or otherwise as to the terms of the contract, it is his duty, and all his duty, to cause it to be made in the way which is customary, as to such property on such a voyage, at the place where he is to make it.⁴

¹ *Harding v. Carter*, 1 Marsh. Ins. 303.

² *Sanchez v. Davenport*, 6 Mass. 258. The defendants in this case, being merchants in Boston, were requested by the plaintiffs in Surinam, in case the vessel should not arrive before a certain day, to procure insurance on the cargo to the amount of 56,600 guilders. The defendants endeavored to procure insurance in Boston, Salem, Newburyport, Portsmouth, and Providence, but without success, the vessel being out of time. They then wrote to their agents in New York, requesting them to procure insurance on a certain amount, less than the whole, and limiting the premium. The agents in New York could not obtain insurance on these terms, but it was finally effected at a higher rate, though not on the whole amount which the plaintiffs requested. It was contended, that, although the defendants might not have been under any obligations to extend their endeavors to New York, yet, as they had in fact done so, they were liable for any negligence or want of sufficient caution in obtaining insurance there. But the court held, that the defendants were not liable, and *Sedgwick, J.*, said: "It is believed to be

impossible to find an instance, where a man in a voluntary effort (not required by any principle of law) to render a benefit to another has been holden to make good any loss which may have happened merely because his generous efforts did not succeed. The utmost for which he can be responsible is a positive loss which his efforts may have occasioned; and as there is none such in this case, we are all of the opinion" that the defendants are not liable. See also *Smith v. Cologan*, 2 T. R. 188, n.

³ *Turpin v. Bilton*, 5 Man. & G. 455.

⁴ Thus, where a vessel had been insured, and a letter mentioning a change of voyage was put into the hands of an insurance broker, and he was told to do "the needful," it was held, that, to determine whether he had done his duty, the papers might, at the trial, be placed in the hands of insurance brokers as experts, and they might be asked what alterations in the policy, in their judgment, a skilful broker ought to have made. *Chapman v. Walton*, 10 Bing. 57. If any usage exists, they are bound to conform strictly to it. In *Mallough v. Barber*, 4 Campb. 150, where insurance brokers were ordered to procure a

It has been held in England, that, if an agent is ordered to effect insurance generally, it is sufficient if he does so with an incorporated company, and he is not liable for not effecting insurance with a private underwriter, although he would have obtained, at the same rate of interest, a policy more favorable to his principal.¹

Neither a special nor even a general agent has any authority to effect insurance merely as such an agent. But in a particular case special circumstances may confer this authority upon him, and make it his duty to insure; but his duties in this respect must depend very much upon usage.²

No agent has, by the mere fact of his agency, full power of substitution,³ unless there is a usage to this effect. But if his acts are adopted by his principal, he is not liable for a loss caused by the

policy "at and from Teneriffe," it was held, that they were liable for not causing a clause, giving liberty to touch at all or any of the Canary Islands, to be inserted; it being shown that a usage existed to cause such a clause to be inserted in the policy without any particular instructions to that effect. And if the agent inserts a clause in the policy which is unusual, and the underwriters are in consequence exempt from responsibility, the agent is liable. *Thompson v. Read*, 12 S. & R. 440. App.

¹ *Comber v. Anderson*, 1 Campb. 523. The insurance in this case was effected with a chartered company, by whose policy the cargo was warranted against partial loss, although the ship should be stranded. It was held that no action lay against the broker for not effecting insurance with a private underwriter, who would have been liable for a partial loss by stranding. In *Moore v. Mourgue*, 2 Cowp. 479, general orders were given to an agent to effect insurance on a cargo of fruit. He accordingly did so with the London Insurance office, whose policies on fruit contained the clause, free from particular average. It was

shown that the policies of the Exchange Assurance Company did not contain this clause. In an action against the agent for not effecting the insurance with the latter company, the jury having found a verdict for the defendant, on the ground that he had acted "*bona fide*, to the best of his judgment," the court refused to set it aside.

² *Shirtliff v. Whitfield*, 2 Brev. 71.

³ *Corlett v. Gordon*, 3 Campb. 472. The plaintiff in this case sent a bill of lading of some cotton to the defendants, requesting them to effect insurance to the whole amount. The defendants had not done business for the plaintiffs before, and they refused to accept the consignment, but indorsed the bill of lading over to a friend and creditor of the plaintiff. He effected the insurance and received the goods, and afterwards became insolvent while in possession of the proceeds. The court held that, if the defendants refused the authority sought to be conferred upon them, they could not turn it over to another, and they were accordingly held liable.

knavery of the sub-agent.¹ He may employ a sub-agent to make inquiries, and do many things for him ; all which, perhaps, do not bind the principal ; but possibly the act of the sub-agent would bind the principal when the thing done is merely ministerial, and implies no discretion or personal judgment.²

If it is his duty to effect insurance, and he does this, and the insurers become notoriously insolvent, it would seem, both in reason and on authority, that it is his duty to effect another insurance.³

He is, of course, bound to follow his instructions ; and the more minute and detailed and the more peremptory they are, the less is his discretion.⁴ It is certain, however, from the nature of the

¹ *Smith v. Cologan*, cited 2 T. R. 188.

² *Mason v. Joseph*, 1 J. P. Smith, 406. The underwriter in this case had given an insurance broker a power of attorney, authorizing him to underwrite any policy of insurance not exceeding £100, and to subscribe the same in his (the underwriter's) name, and to settle and adjust losses. The broker signed a slip for the policy, and the policy was afterwards signed by the broker's clerk. The court expressed a very strong opinion that the act of signing the policy, being but a ministerial act, and not one requiring any exercise of judgment or discretion, might be performed by the clerk. But the point was not decided, as the court were of the opinion that the subsequent act of the defendant showed that he had ratified the signing by the clerk. This was, that on an adjustment of the loss signed by the broker being presented, together with the policy, to the underwriter, he offered terms of settlement.

³ This question is considered at length by Mr. Duer in his valuable work on Insurance, vol. 1, p. 188 - 198. The foreign authorities are shown to be in conflict, and it is said, "that in the

United States the mere insolvency of the insurers can never give a right to the agent to effect a second policy, since, by virtue of the clause in American policies relative to prior insurances, the second policy would be wholly void if effected while the first is still in force." It is also said, and this we have seen to be true, that the insolvency of the insurers does not dissolve the contract. The question is also considered whether, in case the policy is dissolved by consent on the insurers becoming insolvent, it is the duty of the agent to procure another insurance. The case of *Petrie v. Aitchison*, 3 Sess. Ca. 501, before the Court of Sessions in Scotland, is cited to the point that, where a policy becomes inoperative after the risks have commenced, from a deviation or breach of a warranty, it is the duty of the agent to procure another policy applicable to the risks as altered. But in this case a special order was given to this effect. See the next note.

⁴ *Leverick v. Meigs*, 1 Cow. 645, 662 ; *Glaser v. Cowie*, 1 M. & S. 52 ; *Rundle v. Moore*, 3 Johns. Ca. 36. In *Miner v. Tagert*, 3 Binn. 204, the liability of the defendants as agents, for neglecting to insure, was admitted, and

case, that he must possess a reasonable discretion (which can hardly be defined in words), both as to the construction and application of his instructions, and as to the expediency of exact compliance under special circumstances, especially if these were unknown to his principal.

If the written instructions are followed, the broker is not liable for omitting to insert a clause respecting a subject about which there had been some prior verbal communications between the parties.¹ But it is no excuse for a neglect to effect insurance on one subject, that the broker was also instructed to insure another subject against an illegal risk, if the illegality would only have avoided the policy *pro tanto*.²

The discretion of the agent has been especially considered as to abandonment. This is often a very important step. But if it be left entirely to his discretion, all that he is answerable for is the honesty and care with which he exercises this discretion.³ By

it was also agreed that they were to be considered liable as if they had insured the vessel themselves. They defended on the ground that the vessel was not sea-worthy, and that they were not obliged to give a valued policy. The order for insurance was by the correspondent of the plaintiff, and was as follows: "Charge the premium to my account, and advise me thereof. The brig he (Miner) values at \$4,000, but wishes to have \$3,000, say three fourths, insured." It was held that, although this did not order a valued policy, *eo nomine*, yet it was a fair inference from the words used. In *Petrie v. Aitchison*, 3 Sess. Ca. 501, the master was the joint owner of the vessel and the cargo, together with the defendants who acted as agents. They had procured insurance on the vessel, cargo, and master's effects. The vessel deviated, and the master wrote home informing them of the fact, and requested them to make the necessary insurance in consequence of the alteration of the voyage. It was held that they were bound to make insurance on the mas-

ter's effects, as well as on the vessel and cargo.

We have seen, *ante*, p. 49, n. 4, that if goods are insured at and from a certain place, beginning the adventure from the loading of the goods on board the said ship, the goods were not covered unless they were loaded at the place specified. It was accordingly held, where the following letter was written from Malaga to the insurance broker, "I request you will insure £1,000 on goods shipped on board The Pearl from Gibraltar Bay, . . . where I shall send a letter on shore," and the agent effected an insurance on goods by The Pearl, "at and from Gibraltar to Dublin, beginning the adventure upon the said goods from the loading thereof on board the said ship," that the goods loaded at Malaga were not covered, and that the agent was therefore liable. *Park v. Hamond*, 4 Campb. 344, Holt, N. P. 80, 6 Taunt. 495, 2 Marsh. 189.

¹ *Fomin v. Oswald*, 3 Campb. 357.

² *Glaser v. Cowie*, 1 M. & S. 52.

³ *Comber v. Anderson*, 1 Campb. 523, 525.

this abandonment, the agent of an insured, who makes the abandonment, may become thereby the agent of the insurers. As, for example, if a master of a ship, wrecked near the insurers and far from the insured, has been appointed an agent by the insured, with sufficient power to make an abandonment, an abandonment properly made by him would transfer the property to the insurers; and he would become, of necessity, the agent of the insurers. Of course, however, such an agent of the insured can have no power to make the abandonment effectual by acceptance as agent of the insurers.

An insurance agent, like every other agent, is bound to keep his principal informed, with all due promptitude, fulness, and accuracy, of whatever matter relating to the business intrusted to him it is important to the principal that he should know.¹ And if a broker, who obtains the insurance, keeps possession of the policy after a loss has taken place, it seems that he is bound to demand payment of the underwriters, and, if he neglects to do so, he is liable for any loss that may accrue in consequence thereof.²

We may close this section upon the duties of agents in insurance transactions with the general remark, that, whenever it is their duty to do any particular thing, they are liable to the principal for any injury he may sustain by their omission to do that thing; and the extent of the injury is the measure of their liability.³ And where an agent who had been ordered to procure

¹ *Devall v. Burbridge*, 4 Watts & S. 305. And if a person, although not a regular insurance broker, undertakes to procure insurance and is not successful, there is an implied obligation resting upon him to give notice to his employer of the fact. *Callander v. Oelrichs*, 5 Bing. N. C. 58.

² *Bousfield v. Creswell*, 2 Campb. 545.

³ Thus, insurance agents who neglect to obtain insurance are generally considered as liable for the amount which their principal would have obtained from the insurers had they obeyed their instructions. They are, therefore, entitled to deduct the amount of the premium. *Petrie v. Aitchison*, 3 Sess. Ca.

Scotland, 501; *De Tastett v. Croulat*, 2 Wash. C. C. 132; *Morris v. Summerl*, *Ib.* 203. And if the policy would have been void had the agents obeyed their instructions, they are not liable for not effecting the insurance. *Alsop v. Coit*, 12 Mass. 40; *Webster v. De Tastett*, 7 T. R. 157. See also *Delany v. Stoddart*, 1 T. R. 22. So, if the non-insertion of a particular clause, contrary to orders, in no respect injured the insured. *Fomin v. Oswell*, 3 Campb. 357. In one case, where a suit was brought on the policy, which was not successful on account of a concealment of a material fact by the broker, and then an action was brought against the broker, it

insurance to a certain amount did so, and afterwards, without authority, cancelled the policy and obtained another for a smaller amount, he was held liable for the original amount, deducting the premium.¹

If a broker effects insurance for a part owner, and receives from the underwriters on a loss taking place the whole value of the property insured, he cannot as agent dispute the claim of his principal to the whole amount.²

The authority of the agent to effect insurance may be revoked at any time before he has entered into a binding contract with the underwriters. And if he does any acts after this, he does them in his own wrong.³ Bankruptcy, also, of the principal, acts as a revocation of the authority of the agent.⁴ And if the broker pays over the premium to the insurers after he is informed by his principal that the risk has not been run, he cannot recover it from his principal.⁵ In one case, the broker engaged to effect insurance with such "names" as should be to the satisfaction of the insured. The voyage was performed, and the insured did not ask to see the names on the policy, and it was held, in a suit by the broker for the premium, that it was not intended that the names of the underwriters should be submitted to the assured for previous

was held that the broker was liable, but not for the expenses of the suit on the policy, it not appearing that the suit was brought by the desire or with the concurrence of the broker. *Seller v. Work*, 1 Marsh. Ins. 299.

In *Maydew v. Forrester*, 5 Taunt. 615, the assured, who had sustained losses to the amount of £18,000, failed in two suits in consequence of the neglect on the part of the defendants, who were brokers, to communicate certain material letters to the underwriters, and incurred costs to the amount of £2,400. They then gave the defendants permission to try as many more causes as they saw fit, which they declined. The plaintiffs afterwards refunded to certain underwriters, who had paid the losses without being sued, the sums so paid,

without offering the defendants the option of insisting on the plaintiffs' right to retain the money so paid. The judge before whom the case was tried left it to the jury to say, "whether the plaintiffs were bound so to mix themselves with the brokers that they were precluded from paying back those sums to the underwriters without resisting an action for them." The jury having found for the plaintiffs, on the ground that they had pursued a reasonable course, the court refused to set aside the verdict.

¹ *Gray v. Murray*, 3 Johns. Ch. 167.

² *Roberts v. Ogilby*, 9 Price, 269.

³ *Warwick v. Slade*, 3 Campb. 127.

⁴ *Parker v. Smith*, 16 East, 382; *Minnett v. Forrester*, 4 Taunt. 541.

⁵ *Shoemaker v. Smith*, 2 Binn. 239.

approbation, but merely that they should be unexceptionable names, and it was held that the broker was entitled to recover.¹

SECTION IV. — *On the Rights of Insurance Agents.*

THE first and most important right of an agent (which grows out of the general principles of mercantile agency) is, his lien on the policy, and thereby a claim on the insurers for a loss under the policy, for his indemnity for all his charges, expenses, and liabilities in, about, and on account of the same policy. But his lien is confined to these,² unless there be an agreement of the parties extending it; or a usage of the place where both parties reside; or a custom between the parties themselves, sufficient to have this effect.³ Whether he may retain, as his indemnity for future or immature liabilities for his principal, sums paid on the policy, must depend upon whether he has such lien on the policy, or upon his having incurred these liabilities rightfully on the credit of the policy.⁴

As a lien is, at common law, only a right of retaining and continuing possession, it is lost by a voluntary giving up of the possession.⁵ But that means a giving of it up to the principal, or for

¹ *Dixon v. Hovill*, 4 Bing. 665.

² See *Man v. Shiffner*, 2 East, 523; *Green v. Farmer*, 4 Burr. 2214. This question was much discussed in *Dixon v. Stansfeld*, 10 C. B. 398, 11 Eng. L. & Eq. 528. In this case there had been extensive dealings between the parties, the defendants acting as factors for the plaintiffs. While this state of things continued, the defendants received orders to effect insurance on a vessel, which they did, and claimed to hold the policy as security for the balance of their general account as factors. The evidence in the case was somewhat voluminous, and the court held on the whole that the transaction in question was not made by them as factors, and it was accordingly held that the lien claimed did not exist. *Maule, J.*, said:

"I find nothing in the case to show that this policy was effected by (the defendants) in the course of their business as factors. A factor is a person who is employed to sell goods on commission. There was no employment to sell at all connected with the employment under which this policy was effected."

³ See *Castling v. Aubert*, 2 East, 325. By the usage of trade a factor has a lien for the balance of his general account. *Godin v. London Ass. Co.*, 1 Burr. 489, 494; *Hammonds v. Barclay*, 2 East, 227; *Man v. Shiffner*, 2 East, 523. But only for his services as factor. *Dixon v. Stansfeld*, note *supra*.

⁴ See *Olive v. Smith*, 5 Taunt. 56.

⁵ *Cranston v. Philadelphia Ins. Co.*, 5 Binn. 538. See also *Sweet v. Pym*, 1 East, 4.

his benefit; for if the agent hands the policy to another person to hold for the benefit of the agent, this is still, by construction, his possession.¹ It is held, however, that he may keep only, and not use; and therefore if he pledge it as his own, and for his own use, he loses his lien.²

But he may assign his balance or his demand against his principal to a third person, and if he holds the policy as his security therefor, he may transfer this security also, by placing the policy in the hands of the assignee, to be thus held for the benefit of the agent.³ An agent may have possession of the policy for a special purpose only, as for custody, and in such a case, although he makes advances to the insured, he has no lien therefor on the policy.⁴ But even if a broker has a lien on the policy for premiums which he has paid, he cannot refuse to produce it in a suit against the underwriter, and he is a good witness to prove all matters connected with the policy.⁵

So, it is said, he loses his lien, by taking a promissory note or a bill of exchange, *payable in the future*, for his claim on his principal.⁶ The reason is, that this is now an agreement for a credit; and therefore, by implication, waives the lien on the policy. But this must depend upon the question, whether the terms of the credit were inconsistent with the existence of the lien; for if they were consistent with the preservation of the lien, they would raise no presumption of an intention to waive or extinguish the lien.

If he loses his lien by restoring the policy to his principal, and, while his claims are unpaid and unsecured, the policy returns into his hands from his principal, in general his lien revives, unless something said or done indicates that this is not the purpose of the parties.⁷ And this has been held where the agent recovered

¹ Urquhart v. M'Iver, 4 Johns. 103.

² M'Combie v. Davies, 7 East, 5.

³ See Urquhart v. M'Iver, 4 Johns. 103.

⁴ Muir v. Fleming, Dowl. & R., N. P. 29.

⁵ Hunter v. Leathley, 10 B. & C. 858.

⁶ Hewinson v. Guthrie, 2 Bing. N. C. 755.

⁷ Levy v. Barnard, 2 J. B. Moore, 34, 8 Taunt. 149; Spring v. South

Carolina Ins. Co., 8 Wheat. 268. It was held in this latter case that the lien revived for specific, but not for general advances. But in Whitehead v. Vaughan, Cooke's Bankruptcy Laws (8th ed.) 576, it was held that the lien for premiums other than that due on the policy in question revived on the broker's obtaining possession again of the policy.

possession of the policy, for this purpose in fact, but on a different pretence.¹

If the insurance is effected under a special order, the terms of which are inconsistent with the existence of a lien, it is held that none exists; as where an agent, who is ordered to effect insurance and forward the policy, does the former, but retains the policy, it is held that he has no lien.²

A sub-agent has no lien on the policy as against the agent who is his principal for the general balance of accounts.³ Nor has he a general lien against the first principal, if he knew or had cause to know that the person who employed him was only an agent.⁴ But if he did not know that he was a sub-agent, and supposed that he was effecting insurance for his employer who was the actual insured, it might be otherwise;⁵ but this exception does not appear to us to be unquestionable.

Even if the agent have no lien on the policy itself, it is possible that he may have, by the local law of set-off, or by agreement with his principal, or a practice and usage which affect both parties, a right to demand and receive and receipt for sums payable from the insurers, and to set these off against his demands upon the insured. The questions, however, which have arisen on this subject have turned so much on the peculiar laws of set-off of different countries, that we do not propose to consider them in detail.⁶

If an agent is answerable to his principal for a loss, either because he has for a commission guaranteed the policy, or because he is answerable for his negligence in not procuring any, or any sufficient insurance, he is, in respect to salvage, subrogated to his principal's rights, and may have his claim for salvage, or any similar allowance.

¹ *Whitehead v. Vaughan*, Cooke's Bankruptcy Laws (8th ed.) 576.

² *Reed v. Pacific Ins. Co.*, 1 Met. 166. See also *Walker v. Birch*, 6 T. R. 258.

³ *Man v. Shiffner*, 2 East, 523.

⁴ *Maans v. Henderson*, 1 East, 335. See also *Snook v. Davidson*, 2 Campb. 218; *Foster v. Hoyt*, 2 Johns. Ca. 327.

⁵ *Mann v. Forrester*, 4 Campb. 60;

Westwood v. Bell, Ib. 349. But see *Lanyon v. Blanchard*, 2 Ib. 597.

⁶ The English cases are considered by Mr. Arnould, vol. 1, p. 115-126. See also *Olive v. Smith*, 5 Taunt. 56; *Rose v. Hart*, 8 Taunt. 499; *Young v. Bank of Bengal*, 1 Moore, P. C. 150; *Dixon v. Stansfeld*, 10 C. B. 398, 11 Eng. L. & Eq. 528; *Leeds v. Marine Ins. Co.*, 6 Wheat. 565; *Moody v. Webster*, 3 Pick. 424.

If a principal could sue his insurers only by making an abandonment, and sues not them but an agent by whose fault the insurance failed to be made, it seems that there must be an abandonment to him to convert a partial into a constructive total loss.¹

An agent on commission, paying a loss guaranteed by him, may, it seems, sue the insurers in the name of the insured if the policy be payable only to him, or in his own name if the policy be made out to him.²

An agent may be liable to the insurers for the premium. But he can be liable for nothing more than his principal is or would be liable for, if there were no agency.³

SECTION V. — *Of Voluntary Agents.*

THERE are three kinds of voluntary insurance agents: or, to express our meaning more accurately, three classes of persons have been called voluntary insurance agents.

A. Those who, without authority or request, express or implied; and without payment made or promised in any way, voluntarily undertake to effect insurance, or do something in relation to a contract of insurance.

B. Those who undertake to do this because they are so requested, but to whom no payment is made, or promised in any way.

C. Those who are factors, or general agents, of, or have some other business relating to, the insured, by reason of which they effect insurance, or act for the insured in relation to it.

Of the class C we have already said all that seems to be necessary, and shall confine our remarks to the other two classes.

Of Class A.

Any such contract, or act, by any agent of this class, may be ratified by the alleged principal, provided it purports to be made by him as agent, and provided the whole transaction is in good faith, and the ratification, as to time, manner, and all other circum-

¹ See 2 Duer on Insurance 326.

² See *Shee v. Clarkson*, 12 East, 507;

³ See 2 Duer on Insurance 336.

Phoenix Ins. Co. v. Fiquet, 7 Johns. 383.

stances, works no injustice to the insurers, and such a ratification accepts and adopts the whole contract with all its obligations as well as all its rights. This subject of ratification has been also considered. One question, however, is suggested by text-writers, although it has never been submitted to adjudication. It is this: If an agent exceeds his authority, and the principal is informed thereof, and does not with reasonable promptitude disclaim the act, he will, in general, be regarded as adopting and ratifying it. But if we suppose him to be perfectly silent, when informed by insurers of an insurance effected in this gratuitous and officious way, the question may arise, Is this an adoption or a rejection? We apprehend that the circumstances of each case must aid in deciding this question: but, generally, we think that it should be regarded as a rejection, and should have the effect of a declaration by the alleged principal that he would have nothing to do with it. If this be so, the insurers could not hold him for the premium; nor could he, by any act, after once rejecting it by a sufficient silence, adopt and ratify it so as to derive any benefit from it, unless with the consent of the insurers.

If such a contract or act be ratified, the self-created agent may claim of his principal all his reasonable and proper expenses in the matter; and also a proper charge or commission for services which have thus been accepted, where the circumstances indicated that he did not consider himself as *giving* his assistance, but as acting as a business agent, for pay. It might be, however, that he rendered his aid only as a *gift*, and that it was accepted as such; but we think that the burden of proof would lie on the acceptor to prove this. If the contract or act be not ratified, the agent has, of course, no claim whatever against the party whom, without his request, he sought to make his principal or employer, but who did not accept this relation.

Of Class B.

Concerning a requested, but gratuitous or unremunerated agent, we have more difficulty. Doubtless the principal would now be held for the acts of such agent without any further ratification. And every agent, in our judgment, has (unless there be a waiver or a gift on his part) a claim, not only for his reasonable expenses,

but also for his reasonable compensation. But this question involves another, which seems to have been considered as of some importance.

A contract or a transaction of this kind has been learnedly and elaborately considered in a case in New York.¹ The law which has been inferred from it is, first, that a person so requested to effect insurance, and promising to do it, and having attempted or begun to do it, or having done something of or in or about the transaction, but not in such a way as to make a valid insurance, would be liable to the party making the request. And secondly, that if he is requested, but is neither paid nor promised anything, and agrees to do as requested, and without excuse does nothing whatever, he is not liable at all, for want of compensation, or of consideration for his promise.

These conclusions have been generally assented to by those who have had occasion to speak of them. We think them, however, open to some exception or qualification. The distinction between him who does nothing, or who begins but does not finish, and him who does in a wrong way what he does, rests upon no other foundation that we can discern than the difference between nonfeasance and misfeasance or malfeasance. For the first he is not answerable, either *ex contractu* or *ex delicto*; because no action lies against him for simply leaving that undone which he was not bound to do; while he who injures another, by any misfeasance or malfeasance, is liable for the tort. We are not without

me doubt, whether, under this distinction, there must not be more than a mere beginning, more than an incomplete doing of that which needed not to be done at all, and something which is enough more than this to constitute a positive tort, in order to make a wholly unremunerated agent liable.²

¹ Thorne v. Deas, 4 Johns. 84.

² In Thorne v. Deas, the plaintiffs were copartners, and joint owners of one half of a vessel, and the defendant was sole owner of the other half of the same. On the day the vessel sailed on a voyage, one of the plaintiffs requested the defendant to effect insurance on the vessel; this the defendant promised to do, and repeated the promise some days

afterwards, but never did it. The vessel was lost, uninsured, and an action on the case was brought for the nonfeasance. The court held that the action could not be maintained, Kent, C. J., saying, "that by the common law, a *mandatary*, or one who undertakes to do an act for another, without reward, is only responsible when he attempts to do it, and does it amiss. In

But we have some difficulty with the second conclusion also. Chancellor Kent, throughout this case, seems to consider it as

other words, he is responsible for a *misfeasance*, but not for a *nonfeasance*, even though special damages are averred." In the second volume of his Commentaries, p. 570, he refers to this case, and repeats as unquestionable law the rule there laid down. And yet, we should hesitate to admit that here was any such important difference in law (there is no such difference in fact) between not beginning to do what one has promised, and "attempting" or barely beginning and leaving off at once. The cases cited in *Thorne v. Deas* (which was most elaborately argued as well as decided) lead to no other conclusion than this: that he who, without consideration, promises, and does nothing, "has merely told a falsehood" (says *Kenyon*, C. J., in *Elsee v. Gatward*, 5 T. R. 143), for which no action lies. But if he has actually done something, and so done it as to inflict an injury, he is liable for the *misfeasance*. But the very definition of *misfeasance* (to distinguish it from *malfeasance* on the one side, and *nonfeasance* on the other) is the doing of some lawful act in an unlawful way. See 2 Vin. Abr. 35, Doct. Pl. 62. Now, the mere "attempting to do," to use the words of the court in *Thorne v. Deas*, does not seem to us enough to constitute, of itself, actual *misfeasance*. In *French v. Reed*, 6 Binn. 308, the case of *Thorne v. Deas* (under the name of *Thornbury v. Day*) is referred to and approved; but without any extended consideration of the reasons or authorities. In England, in *Wilkinson v. Coverdale*, 1 Esp. 75, *Erskine* cited, from manuscript, *Wallace v. Telfair*, wherein *Buller*, J., held, that, "where a party voluntarily under-

took to procure insurance, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so negligently or unskilfully that the party could derive no advantage from it, he should be liable to an action." And "Lord *Kenyon* acquiesced in the decision, and suffered the cause to proceed"; but the plaintiff failed to prove any promise, and was nonsuited. In *Balf v. West*, 13 C. B. 466, 22 Eng. L. & Eq. 506, a somewhat similar question was presented. The head-note is: "One who gratuitously accepts the office of steward of a horse-race is not responsible for a loss resulting to one who enters a horse for the race, from his mere *nonfeasance* in omitting to appoint a judge, — at all events, unless it appears that he has actually entered upon the of duties the office," — the words we have italicized implying that the reporter understood the court as leaving it in doubt whether the defendant would even then have been responsible. There was a general demurrer to the declaration, and it appeared on the argument that the declaration did not show that the defendants entered upon the execution of the office. *Garth*, for the plaintiffs, said: "It must be conceded, that, if this declaration does not show that the defendants had actually undertaken the office of stewards, the action cannot be maintained. In that respect, probably, the court will allow the plaintiff to amend." *Jervis*, C. J.: "You may amend on the usual terms." *Cresswell*, J.: "You must not assume that the court gives you the slightest hint that you can sustain your declaration with the proposed amendment." In the course of the trial, *Jervis*, C. J.,

arising under the law of mandate, and perhaps as under the law of bailment. Certainly it was not a case of bailment, for nothing whatever was bailed, and nothing whatever was received; nor was it a case of mandate, if a mandatary, as commonly defined, and by Kent himself,¹ is a gratuitous bailee, who is requested to do or have something done about the thing bailed.

A mandate, however, may perhaps be only a voluntary commission, offered and undertaken wholly without compensation; and in this sense the defendant in *Thorne v. Deas* might be called a mandatary.²

The essential question upon which this case actually depended was this: Was the defendant a gratuitous acceptor of a commis-

said: "The rule is well put in Smith's *Mercantile Law*: 'If he [an unremunerated agent] do commence his task, and afterwards be guilty of misconduct in performing, he will, though unremunerated, be liable for the damage so occasioned; since, by entering upon the business, he has prevented the employment of some better qualified person; and the detriment thus occasioned to his principal is a sufficient consideration to uphold an undertaking on his part to act with care and fidelity.'" The reason here given for the rule qualifies and construes it. One who promises and does nothing may cause as much damage and as effectually prevent the employment as if he promises and barely begins to perform, or, in Kent's words, "attempts to do it," and stops at once; but still he is not, and we think neither of them would be, liable. And it is to be remembered, that the decision in *Thorne v. Deas*, so far as it relates to what would make an agent to whom no compensation had been *promised* responsible, is altogether *obiter*, as the whole case proceeds on the supposition that the defendant was wholly unremunerated, and rests on that ground. Upon the whole, an examination of all

the authorities satisfies us that the true distinction is not between one who, without remuneration, after a promise to do, attempts or begins to do, and only begins or attempts to do, — but between him who, on the one hand, promises and either does nothing, or so little that it is only as injurious as nothing would be, and him, on the other hand, who, after such a promise, injures the party to whom the promise is given, either by doing a wrong thing, which would be *malfesance*, or by doing a right thing in a wrongful and injurious way, which would be *misfesance*.

¹ 2 Kent, 558. So it seems to be considered as belonging to the law of bailment in 1 Smith's *Leading Cases* 82, and cases gathered to illustrate *Coggs v. Bernard*. It has been held that the delivery and acceptance of any letter, or parcel, or money, or note, or indeed of any chattel, makes a new case of it, and brings in a new consideration. *Durnford v. Patterson*, 7 Mart. La. 460; *Shillabeer v. Glyn*, 2 M. & W. 145; *Robinson v. Threadgill*, 13 Ired. 39; *Whitehead v. Greetham*, 2 Bing. 464, 1 McLellan & Y. 205, and 10 J. B. Moore, 183.

² Pothier de Mandatis, n. 1.

sion? The court came to the conclusion, from the attendant circumstances, that he had never intended to ask or receive a compensation, and would have had no right whatever to demand one, had he performed the service. And if this be assumed there can be no doubt whatever that the case was decided aright.

The general rule, however, must be this: if A asks B to render him a service, and B agrees to do it, and does it, B thereby acquires a right to demand from A a reasonable compensation, which A is accordingly bound to pay. And this obligation of A to pay for the service when rendered is a good consideration for the promise to render it.

We doubt whether there be any exception to this rule. But there certainly may be a waiver of the right of the agent or servant to his compensation, which may be express, or it may be implied from some special relation of the parties, or any circumstances which indicate an agreement or understanding of the parties that there shall be no pay for the service. We are, however, quite confident that this waiver cannot be always, or even generally, implied from the mere silence of the parties in relation to the compensation.

We should say, therefore, that the general rule of law is, that one acting in regard to insurance transactions by the request of another acquired a right to compensation, as perfect as if he stipulated for pay and it were promised him. And that if he did the work well, or did it ill, or neglected to do it at all, his rights, and the rights of others in respect to him, would be much the same as if he were a common paid agent.

CHAPTER IX.

ACTION.

SECTION I. — *Of the Form of the Action.*

OF the general principles of action on contracts we do not propose to treat, but only of their application to policies of insurance and to questions arising out of the business of insurance. The form of the action is much modified in many of our States by modern codes of practice; but wheresoever the common law remained in force, and actions are founded upon its rules, if the policy be sealed the action should be covenant or debt.¹ A marine policy is not generally sealed now in England. In this country it is seldom, if ever, sealed. When not under seal it is a simple contract, and assumpsit is the proper action.²

¹ The following cases are instances where covenant was brought on a sealed policy: *Sullivan v. Mass. Mut. F. I. Co.*, 2 Mass. 318; *Maryland Ins. Co. v. Graham*, 3 Harris & J. 62. And there are many cases, some of which are cited in the books as authorities on this point, where covenant has been brought, while it does not appear from the reports whether the policy was sealed or not; as the following: *Watson v. Ins. Co. of N. A.*, 1 Binn. 47; *Sutron v. Mass. Mut. F. Ins. Co.*, 4 Mass. 330; *Smith v. Universal Ins. Co.*, 6 Wheat. 176; *Baltimore Ins. Co. v. Taylor*, 3 Harris & J. 198. In New York an early statute declared that policies executed in a certain way, though not under seal, should have the effect of specialties; and the parties were allowed to sue either in covenant or on the case. *Ferriss v. N. A. F. Ins. Co.*, 1 Hill, N. Y. 71.

If an action of debt is brought, the

plaintiff may recover a less sum than that demanded in the writ when an entire sum is demanded, and it is shown by the counts to consist of several distinct accounts, or where the precise sum demanded is diminished by extrinsic circumstances. *Hughes v. Union Ins. Co.*, 8 Wheat. 294. To sustain an action of covenant on the new contract founded on an assignment of the policy, the assignment must be under seal. *Bayle v. Willsborough Ins. Co.*, 3 Dutch. 163.

² In *Luciani v. American F. Ins. Co.*, 2 Whart. 167, the plaintiff was insured for one year in a fire policy under seal, which contained a clause that persons desirous of continuing their insurances might do so by a timely payment of the premium, without being subject to any charge for the policy. Accordingly the insurance had been annually renewed for several successive years, and these

If an action of any kind be brought upon a policy, and carried to judgment, we know not why all rights and remedies under this judgment are not the same as under any other.

SECTION II. — *Who can bring an Action on a Policy.*

ONE who is insured by name can always sue upon the policy. But in many of our marine policies, and perhaps in a large majority of them, he who is insured is not insured for his own exclusive benefit, nor perhaps for his direct benefit at all, but for the interest or benefit of other parties. We have already seen that this is usually expressed by the phrase, "for whom it may concern," or "for account of —," or by other language of similar meaning and effect. In any such case the party whose name is in the

renewals without seal had been indorsed on the policy with variations in the amount insured, and in the premium. The court held that these indorsements were not specialties, nor a part of the original specialty, but were at most only parol contracts; and therefore covenant would not lie. The court said, however, that the plaintiff might have demanded a policy in conformity with the clause above mentioned, and have maintained an action for breach in case he had been refused; or he might, perhaps, have maintained assumpsit on the contract remaining in parole.

Mut. Ins. Co. in Balt. Co. v. Deale, 18 Md. 26, was somewhat similar to the above. There was an original policy, under seal, against fire, on which there had been two indorsements, without seal, of additional insurance. There were three actions brought: one of covenant on the policy, and two of assumpsit on the indorsements; and the case above quoted from 2 Wharton was cited as an authority for the form of the actions. In reference to this matter, the court say, per *Bartol, J.*: "There is nothing in the original covenant which

continues it in force as a specialty, binding the company by subsequent indorsements of additional insurance. They are new distinct contracts by parole." In *Marine Ins. Co. v. James Young*, 1 Cranch, 332, the question of the kind of action on a sealed policy came squarely before the court. The defendant had been insured by the plaintiffs on a sealed policy, and brought an action of assumpsit to recover the amount insured, in the Circuit Court of the District of Columbia. Judgment was given for the insured, whereupon the Insurance Co. obtained a writ of error assigning as one of the grounds of error that assumpsit had been brought on a sealed contract. The case went up to the Supreme Court, where this point was argued, and the judgment of the court was as follows: "The court reversed the judgment, and ordered it to be arrested, because the action is a special action on the case on the policy, and the declaration shows that the policy is a specialty. The court seemed to be of opinion that an action of covenant would lie upon it against the company in their corporate name."

policy may bring an action in his own name for the benefit of all who are concerned or interested;¹ or the party who is actually

¹ This point was settled as early as 1815, in the case of *Davis v. Boardman*, 12 Mass. 80, which was an action of assumpsit brought by the plaintiff on a policy underwritten by the defendant. The policy stated that "Mr. Samuel Davis, or as agent, doth make insurance and cause to be insured, lost or not lost, the sum of three thousand dollars," &c. It was objected by the defendant that the plaintiff having insured for himself, "or as agent," could not recover more than one half of the sum insured. The court, per *Jackson, J.*, said: "The parties have agreed, in their statement of the case, that this insurance was in truth made for the use and benefit of the plaintiff and Richardson; and we see no difficulty in carrying that intention into effect. It is an insurance of all the interest which the plaintiff and Richardson, or either of them, had in the property at risk to the extent of the sum insured by this policy. If this be not the meaning, we must suppose that the plaintiff, when procuring this insurance, did not know whether he wanted it for himself or for Richardson, although he knew that one or the other of them intended to be insured, and he was willing to become responsible for the premium. So, as to the insurers, we must suppose that they were willing to insure this vessel and cargo either for the plaintiff or for Richardson; but that they would not insure for both of them jointly. This is to suppose that both parties acted without motive, or in a manner wholly inconsistent with the usual course of such transactions. . . . It is therefore the opinion of the court, that the plaintiff is entitled to recover for a total loss on the cargo to the ex-

tent of his own and Richardson's interest therein," &c. The same question came up in *Ward v. Wood*, 13 Mass. 539. The plaintiff caused to be insured for whom it might concern the sum of \$5,000 on the ship *Hyder Ali, &c.*, and averred in his declaration that the insurance was intended to cover the interest of himself and C. S., both of whom were interested in the property. The action was brought by Ward alone; and it was objected by the defendant that C. S. should have been joined in the action. But the objection was overruled, and the court said, per *Parker, C. J.*: "The plaintiff caused the insurance for whom it might concern, and the interest of C. S. was known at the time to the underwriters. It is in conformity with the contract that the plaintiff should maintain the action in his own name; and it is agreeable to usage that he should do so on policies in this form. The principle on which this objection is overruled is settled in the case of *Davis v. Boardman*," *supra*. The same principle is acknowledged in *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; and again in 1856, in *Protective Ins. Co. v. James Wilson & Co.*, 6 Ohio State, 553. *Wilson & Co.* were insurance brokers, who had effected insurance on goods for other parties, and brought an action in their own names to recover for a loss. The goods were shipped by a canal-boat, and were damaged in consequence of a defect in one of the decks. *Shaw & Co.* were the shippers of the goods, and *Samuel Kuhn* and others were the consignees and parties in interest. *Wilson & Co.*, the plaintiffs, in the court below recovered judgment, which was affirmed on

insured under such a clause, the policy being made for his benefit, may, although he is not named in the policy, bring an action upon it in his own name.¹

appeal to the District Court; whereupon the insurance company obtained a writ of error to the Supreme Court, assigning as their grounds of error, first, "that neither the plaintiffs below nor Shaw & Co. had an insurable interest in the loss"; and second, "that this particular insurance was not made for the parties for whose use the plaintiffs sued." The court say, per *Bowen*, J.: "The parties who sued in this case were nominal plaintiffs only, . . . they were the agents of the several owners of the cargo in perfecting this insurance. . . . Shaw & Co. acquired no insurable interest themselves, nor any right to sue. But Wilson & Co. occupy quite a different relation to the consignees. They procured and held in their own names, but for those whom it might concern, the policy and its indorsement. An interest covered by the insurance was thus created, which it is proper for them to enforce, and which is of such a nature as authorized the suit to be brought and carried on in their names for the use of those who have sustained the loss." And the judgments of the courts below were affirmed. See also *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 82; *Jackson v. Farmers' Mut. F. I. Co.*, 5 Gray, 52; *Munson v. N. E. Mut. Ins. Co.*, 4 Mass. 88.

Under a policy of insurance to the charterers of a vessel "for whom it concerns," "on freight on board," the charterers may recover the amount of the money payable under the charter-party at the termination of the second voyage, and which they have agreed to get insured, although the vessel is totally lost at the outward port. *Silloway v. Neptune Ins. Co.*, 12 Gray, 73.

If the loss be paid to the party insured, but not interested, as he recovered for the benefit of the party interested, so the latter has an action for money had and received against the former to recover the amount paid. See *Burrows v. Turner*, 24 Wend. 276. In this case *Burrows*, who together with *Turner* owned a vessel, had her insured. The words of the policy were as follows: "Silas E. Burrows, on account of —, do make insurance," &c. The vessel was lost; and, *Burrows* having recovered the amount insured on her, *Turner* brought an action for money had and received, and recovered judgment. *Burrows* excepted, and on error took the case to the Supreme Court, where the judgment of the court below was affirmed. See also *Roberts v. Ogilby*, 9 Rice, Exch. 269. If the action on a policy be brought in the name of the agent who procured the insurance, the declaration should state who were the real parties in interest at the time the policy was made and at the time of the loss. *Rider v. Ocean Ins. Co.*, 20 Pick. 259. Under a policy insuring A, for whom it may concern, payable to B (the claim of B on A having been satisfied before the action was brought), the rights and duties of the parties were held to be the same as if the clause for the payment of the loss to B had not been in the policy. *Rider v. Ocean Ins. Co.*, 20 Pick. 259.

¹ This is only the application to policies of insurance of a general principle in the law of contracts, that, when a contract is made for the benefit of a third person, we may maintain an action upon it. 3 Bos. & Pul. 149, note; *Dutton v. Poole*, 2 Living. 210; *Hall v.*

The technical rules of the common law would not permit a party thus interested, but not named, to bring an action if the policy

Marston, 17 Mass. 575. And Mr. Justice Bayley, in *Sargent v. Morris*, 3 Barn. & Ald. 276, says: "You may bring your action either in the name of the party by whom the contract was made, or of the party for whom the contract was made. In policies of insurance, it is a common practice to bring your action either in the name of the agent or principal." The point was expressly decided in *Farrow v. Com. Ins. Co.*, 18 Pick. 53, which was an action brought by the owner of a vessel to recover on a policy in which the defendants insured "C. & L. for the owners, payable to C. & L." The action was brought with the consent of C. and L., who certified that they had no interest in the case. The defendants insisted that there was an express contract to pay to C. & L., which could not be varied without the consent of both parties. In giving the opinion of the court, *Putnam, J.*, says: "If the action were brought in the names of C. & L., and they should recover judgment and execution, the money would be payable to them, and it would be for the use of the owners. . . . And if these words were not inserted in the policy, it seems to be conceded that this action might well be maintained in the names of the owners. . . . There are obvious reasons for the introduction of the clause in question. The insurance brokers might desire to have the loss paid to them to indemnify them for any advances for premium or otherwise which they might have against the owners; and the insurance company might desire to have that clause to enable them to set off any legal claim which they might have against the in-

surance brokers. And it would authorize them to pay the loss to the brokers, without any power of attorney from the owners. But in the case at bar these reasons do not apply. . . . The insurance brokers consent [to the plaintiffs bringing the action], and say that they have nothing to do with the matter; and the defendants do not show that they have any matter of set-off against the brokers." And the court unanimously gave judgment for the plaintiffs. We have cited this case at length, because it not only supports the doctrine of the text, but goes so much further. The doctrine that the party for whose benefit the insurance is made may bring an action in his own name is also established in the earlier case of *Ruan v. Gardner* (1804), 1 Wash. C. C. 145. In this case insurance was effected by one Sparks, "in the name of Henry Sparks and all others interested." The plaintiff, who was the owner, introduced Sparks as a witness, who was objected to by the defendants on the ground of interest; but being examined on the *voir dire*, he denied any interest in the event of the cause. Then it was objected that Ruan could not recover on a policy made in the name of Sparks. But the court said that there was no weight in the objection; for "Ruan is not only the nominal, but substantial and real plaintiff; it being clearly proved that Sparks effected the policy upon property belonging to him and at his request." In *Maryland Ins. Co. v. Graham*, 3 Har. & J. 62, the policy stated that H. & W. Young, for account of T. G. (the defendant), did make insurance, and cause themselves and their and every of them

were under seal. In a recent case in England, however, the right to bring the action, by one interested and not named, is extended to sealed policies.¹ The reasoning by which this conclusion is reached has the aspect of an ingenious effort to overcome a merely technical difficulty. Perhaps a similar conclusion might now be reached in this country, if, contrary to the usual practice, such a policy was sealed; it has, however, been held, here and in England, that if the policy be under seal, the action of covenant upon it must be in the name used in the policy, although for the benefit of the parties interested.² The action is generally brought in this

to be insured, &c. Graham alone brought the action, which was covenant, the policy being under seal, and recovered; and on appeal, in which the objection that Graham was not a party to the specialty, and therefore could not sue upon it, was strongly insisted on, the judgment of the lower court was affirmed. See also *Skinner v. Stocks*, 4 B. & Ald. 437; *Felton v. Dickinson*, 10 Mass. 287.

¹ *Sunderland Mar. Ins. Co. v. Kearney and Another*, 16 L. B. 925, 6 Eng. L. & E. 312. In this case the insurance company had issued a sealed policy, insuring Kearney, who was stated by the policy to have "represented to the company that he was interested in or duly authorized as owner, agent, or otherwise to make the insurance." Kearney and Woonan, both of whom were interested, brought an action of debt; and it was objected that Woonan, not being named in the policy, could not join as plaintiff. To this Lord Campbell, when the case went up on error, said: "It seems to us that the insurers covenanted to pay to the persons who were interested in that subject-matter, and for whom the policy was effected; *certum est quod certum reddi potest*. A designation which cannot be mistaken is, for this purpose, as good as the actual name of the individual. The com-

pany engaged to make good all losses and damages which might happen to the subject-matter of the said policy. To whom were they to make good? Necessarily to the parties interested in the subject-matter who were damaged by the loss. These parties were the assured, and accordingly the stipulations by the company are with the assured. And he goes on to say: "There are no reported decisions on this point, because the objection has never before been taken. . . . Upon [sealed] policies effected by brokers many actions have been brought in the names of the parties interested, without any objection being made or thought of respecting the right of the parties interested to sue." The judgment was for the insured. See also *Maryland Ins. Co. v. Graham*, 3 Harris & J. 62, cited *supra*, p. 443, n. 1.

² In *Gilby v. Copley*, 3 Lev. 138, it was held, that "where a deed is between parties, then no one that is a stranger can take advantage thereof by way of action." And in *Offley v. Waide*, 1 Lev. 235, it was held, that on an obligation to A to the use of B, B cannot sue, for he is no party to the deed; nor can he release the obligation. See also *Pigott v. Thompson*, 3 Bos. & P. 147; *American Ins. Co. v. Insley*, 7 Pa. St. 223, cited *post*, p. 446, n.; *De Bolle v. Pa. Ins. Co.*, 4 Whart. 68, cited below, same note.

country in the name of the person procuring the insurance, and who is named as insured, unless the others who are intending to be insured are also named.¹

There are cases in Pennsylvania to the effect that no action can be maintained unless it be brought in the name of the party who is named in the policy. We think the prevailing rules are as we have above stated.²

¹ *Davis v. Boardman*, 12 Mass. 80; *Ward v. Wood*, 13 Mass. 539; *Reed v. Pacific Ins. Co.*, 1 Met. 166; *American Ins. Co. v. Insley*, 7 Pa. 223; *Munson v. New England M. Ins. Co.*, 4 Mass. 88; *Kemble v. Rhinelander*, 3 Johns. Ca. 130; *Goodall v. New England Ins. Co.*, 25 N. H. 169 (5 Foster); *Barnes v. Union Ins. Co.*, 45 N. H. 21.

² *De Bolle v. Pa. Ins. Co.*, 4 Wharton, 68. This was an action of covenant on a sealed policy of insurance, made between the defendants of the one part, and Joseph Fleming, "as well in his own name as for and in the names of all and every other person and persons to whom the property thereby insured did, might, or should appertain," of the other part. It was objected that on such a policy only Joseph Fleming, who alone was named as a party, could bring the action; and with regard to this point the court say: "A covenant being an agreement, it is plain that in legal as also in common parlance there must be at least two parties to it. And it would seem to be equally plain that no covenant can be deemed perfect, unless the names of the parties are set forth or made known by it in some way; for without this it does not appear that there are parties to it; and without parties it is obvious there can be no agreement or covenant. Nor can a person be made a party to a mere personal covenant in a deed, who does not appear to be such, or whose name does not appear in any

way on the face of it by averment, so as to enable him to maintain an action therein in his own name. "And they go on to say that the reason why the party in interest may bring assumpsit on an unsealed policy is, that not only has the consideration, viz. the premium, moved from him, but because he is the party actually injured by the loss. "But in regard to an action of covenant which is founded upon a deed, the moving or original cause for executing it is not looked to for the purpose of maintaining the action, because the sealing and delivering the deed is a sufficient consideration for that, and renders it binding upon the covenantor to the covenantee alone, though the consideration which actually induced the making of the covenant should appear in the deed to have come from a third person; and whether the covenant or obligation created thereby appears to be for the benefit of the covenantor or a third person, the action must be brought in the name of the covenantee. Fleming being the only covenantee named in the deed here, we therefore think that no action can be supported upon it against the defendants, unless it be brought in his name." In *American Ins. Co. v. Insley*, 7 Pa. State, 222, an action was brought on a sealed policy by the parties named as insured, who recovered. And with regard to the point now under consideration, the court say: "The policy is joint, and the suit

Sometimes, while one party is mentioned as insured, it is provided in the policy that the loss is payable to another. Here it must be certain that this other may sue in his own name.¹

is consequently joint, in which the plaintiffs are the legal party, and consequently entitled for whomsoever it may concern, without setting out the equitable and derivative interests, which are no part of the title. Even as trustees, they could recover by showing a fiduciary interest; for, as a suit on a *sealed policy must be brought in the name of the covenantee*, if the plaintiffs could not recover the other parties would be without remedy." By comparing the opinions in these two Pennsylvania cases with that of *Lord Campbell* in *Sunderland Mar. Ins. Co. v. Kearney*, 16 Q. B. 925, cited *ante* p. 445, n. 1, it will be seen that they cannot be reconciled. *Shep. Touch.* 369, is an authority against *Lord Campbell*; for he says: "If an obligation be made to J. D. to the use of I. S., this is a good obligation for I. S. in equity; and some have said he may release it; but this is much to be doubted, for it is certain I. S. cannot sue the obligor in his own name; but when he hath cause of suit, he may compel J. D. in chancery to sue the obligor."

¹ *Motley v. Manuf. Ins. Co.*, 29 Me. 337, was an action of assumpsit on a policy of insurance, procured by lessees of mortgaged property according to a covenant in their lease to keep the property fully insured. In the policy was a stipulation that, in case of loss, the same should be paid to *Motley*, the mortgagee. During the life of the policy the buildings were destroyed by fire; but, after their destruction, the land was a sufficient security for the mortgage debt. One of the grounds of defence was that the promise was not made to the plaintiff, nor expressed to

be for the benefit of any but the persons named. The court say: "It is sound doctrine, applicable to simple contracts generally, and the appropriate and well-established doctrine of contracts of insurance, that, if one make a promise to another, for the benefit of a third, the latter can maintain an action upon it in his own name. Bringing the action is a sufficient ratification by the plaintiff of the acts of the lessees, in procuring the insurance for his benefit. A mortgagee is entitled to recover the full amount of the insurance in case of loss, if such sum does not exceed the amount due and secured by the mortgage. Upon these principles the plaintiff is entitled to recover." In *Rider v. Ocean Ins. Co.*, 20 Pick. 259, the defendants insured the plaintiff, loss payable to *W. Curtis*. We find in the report the following dictum by *Putnam, J.*: The plaintiff "had a right to enforce the policy in his own name, for the benefit of whomsoever it concerned; or the action might have been brought in the name of the *cestui que trust*." And the doctrine is admitted in *Farrow v. Commonwealth Ins. Co.*, 18 Pick. 53. *Myers v. Keystone Mut. Life Ins. Co.*, 27 Pa. St. 268, seems to favor the same view, but it does not appear from the report how the policy was worded. The policy was on the life of one *Myers* for the benefit of his wife, who was the plaintiff in this action. The decision rested on other grounds; but with reference to this point, *Lowrie, J.*, says: "Though we incline to think that this action is rightly brought in the name of the person for whose benefit the insurance was effected, yet this is not material." Hen-

Sometimes, when one party is insured by the policy, an indorsement on the policy states for whom the insurance is made; and in one case, in which this indorsement stated that the insurance was for the person mentioned, and two others, each one third, payable to the person mentioned, it was held that an action might be brought on the policy by the three persons jointly.¹

In some cases, it would seem that the assent of the persons named as insured, as those to whom the loss is payable, was necessary to enable the owners of the property for whom the insurance was made to bring an action in their own names;² and this assent was required from the person named as the party to whom the loss was payable, to enable the party insured to bring an action in his own name.³

shaw v. Mut. Safety Ins. Co., 2 Blatchf. 99.

But in the case of mutual companies, where the insured is a member, the action should be brought in his name, and not in that of the party to whom the loss is payable. *Nevins v. Rockingham Mut. F. Ins. Co.*, 25 W. H. 22; *Blanchard v. Atlantic Mut. F. Ins. Co.*, 33 N. H. 9.

¹ *Williams et al. v. Ocean Ins. Co.*, 2 Met. 303. The court, per *Wilde, J.*, say: "The plaintiffs were the party insured, and the defendants' promise must be considered as made to them, although the loss was payable to Bridge. But he had no interest in the policy, except as part owner; and by the indorsement on the policy it is expressly stipulated that the insurance should attach for the plaintiffs, one third each, payable to B. But if this indorsement had not been made, we think it quite clear that this action might be well maintained. B. was insured 'for whom it may concern'; and on such a policy unquestionably the owners of the property insured may maintain an action in their own names to recover a loss. . . . B. . . procuring the policy, acted as prin-

cipal as to his own share of the vessel, and as agent of the other owners as to their shares. The contract, therefore, is to be construed as a contract between the defendants and the owners of the vessel."

² This was evidently the opinion of *Putnam, J.*, in *Farrow v. Commonwealth Ins. Co.*, 18 Pick. 53 (cited fully *supra*, p. 443, n. 1), though the point was not expressly decided. If the reason usually assigned for having the policy made in the name of the agent, or the loss made payable to him, — viz. that the agent may thus be secured for any advances he may have made, — be the true one, as is asserted in the above case, then, in order that the precaution may be effectual, the agent must have the option of giving or withholding his consent to the action. See *Hurlbert v. Pacific Ins. Co.*, 2 Sumn. 471.

³ This seems evident; for in such cases the loss is made payable to another than the owner, either as security or indemnity, which he cannot be presumed to have relinquished. *Farrow v. Commonwealth Ins. Co.*, 18 Pick. 53; and see *Motley v. Manuf. Ins. Co.*, 29 Me. 337. In *Jackson v. Tanners' Mut. F.*

If persons are jointly insured, the action must be in their names jointly.¹ It was, however, held in New York in a fire policy, but

Ins. Co., 5 Gray, 52, the defendants insured the plaintiff's property, with the provision, "in case of loss by fire, payable to S. L., mortgagee, to amount of \$ 400. The plaintiff brought the action with the assent of the mortgagee, and it was objected by the defendants that it should have been in the name of the mortgagee. This objection was overruled at the trial, and afterwards on exceptions by the Supreme Court, — Shaw, C. J., saying: "Under such a contract as this, where the money in whole or in part is made payable to a mortgagee in case of loss, the original assured does not cease to be a party to the contract, and to have an interest in the insurance. He has an interest to have the money paid to his mortgagee, because it extinguishes his own debt *pro tanto*, and inures to his benefit as if paid to himself. We think, therefore, that, with the knowledge and assent of such mortgagee, the action may be brought and maintained by the original assured; but with this difference: if such authority and assent were given before the commencement of the action, the plaintiff will be entitled to recover his costs; but if they were not given till after the suit was brought, the plaintiff will not be entitled to recover costs of the suit. In *Ennis v. Harmony F. Ins. Co.*, 3 Bosw. 516, which was an action to recover on a policy insuring the plaintiff, "loss, if any, payable to E. B. Graves, mortgagee," the court say: "There is no averment that Graves has been paid. . . . It is plain then that Ennis alone cannot recover the amount of the loss so long as Graves, the mortgagee, remains unpaid. Graves has an absolute right to recover the

amount of the loss; and payment to Ennis, without the *assent* of Graves, would not discharge the liability of the company to the mortgagee. So long as the mortgage remains unsatisfied, Graves is a necessary party to the action."

¹ This was distinctly decided in *Blanchard v. Dyer*, 21 Me. 111. This was assumpsit on a policy of insurance whereby several underwriters insured four persons, one of whom was the plaintiff, on a certain schooner. The action was brought in the name of Blanchard alone, to recover for his share of the loss. At the trial before the District Court the judge directed a nonsuit, on the ground that other persons should have been joined as plaintiffs; and at a subsequent argument on exceptions before the Supreme Court, the nonsuit was confirmed. The court say: "If the same principles apply alike to this and ordinary contracts, the action cannot be maintained in the name of one only of the assured. Numerous cases have been cited, in order to show that policies of insurance are exceptions to the general rule in this respect; but we do not perceive an analogy between those cases and the one at bar. It is true, policies are informal contracts, and are to be liberally construed; but we cannot believe that established rules are to be broken down, unless reason and necessity justify it. Nothing is here presented which shows a severance of the contract in any manner; and it is not pretended that any change has taken place in the interests of the assured since the policy was made. The policy does not purport to be to the plaintiff or any other as agent

for reasons that would apply equally to a marine policy, that where two persons are jointly interested in, and jointly insured upon, certain property; and one conveys his interest therein to the other before the loss, they cannot maintain an action jointly for the loss;¹ and we have authorities that the assignee must bring his action in his own name, no joint action being maintainable.²

In a case where two persons were insured, and the policy declared that it was for account of a third person, and that "themselves, and their, and every one of them, were insured," it was held that this third person might bring an action in his own name.³

of the owners; but it runs to all, each being expressly named." And in conclusion: "But we can find no case where the general principle, — that the suit shall be between the parties to the contract, according to its terms, when all are interested, and there has been no severance, — so essential to prevent litigation, has been violated."

Williams v. Ocean Ins. Co., 2 Met. 303, was an action on a policy which insured S. G. Bridge, "for whom it may concern"; on which policy there was the following indorsement: "It is understood that the within insurance attaches for S. G. Bridge, G. Adams, and I. H. Williams, one third each, payable to S. G. Bridge." The action was brought in the names of all the insured jointly, and was held to have been properly brought.

¹ *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comst. 210.

² In *Ferriss & Eaton v. N. A. F. Ins. Co.*, 1 Hill (N. Y.) 71, the plaintiffs had been insured jointly; but Eaton had subsequently assigned to Ferriss all interest in the policy and the subject of the policy. The act incorporating the insurance company settled this question in favor of the defendant; but the court seemed to think that, apart from this act, the joinder of Eaton was bad. See also *Howard and Ryckman v. Albany*

Ins. Co., 3 Denio, 301, in which Ryckman had assigned his interest in the property insured before the loss happened. It was held, *Bronson, C. J.*, dissenting, that the plaintiffs could not recover, because they had no joint interest in the property at the time of the loss. And the same doctrine was held in *Murdock v. Chenango Mut. Ins. Co.*; 2 Comst. 210, and the above case recognized as binding. In this case the question was, whether, if two tenants in common were insured, but before loss one of them conveyed all his interest in the premises to the other, they could maintain a joint action on the policy; and it was held that they could not. The court say: "In general, the action on a contract must be brought in the name of the party in whom the legal interest in such contract is vested. The moment that Garratt sold all his interest in the property insured, he ceased to have any interest in the contract of insurance." See *Work v. Mer. & Far. Mut. F. Ins. Co.*, 11 Cush. 271. But *Hobbs v. Memphis Ins. Co.*, 1 Sneed, 444, is a case directly contrary to all the above-cited authorities, with which the court expressly say that they do not concur.

³ *Maryland Ins. Co. v. Graham*, 3 Harris & J. 62.

No person can bring an action under a policy, unless he is actually interested in the property insured, and also interested in the policy itself.¹ Policies are often so made as to cover interests

¹ There must be an interest in the property insured. See *Routh v. Thompson*, 11 East, 428, where a policy effected by captors on a captured ship was held to give them no right of action, because the captured property belongs to the government. *Haynes v. Rowe*, 40 Me. 181, was an action by a ship-owner to recover money which had been paid by an insurance company to the defendants. The insurance had been effected by the master of the vessel, and was alleged by the defendants to have been procured solely for his benefit. The court say: "The language 'on account of whom it may concern,' or 'for the benefit of the captain and owners,' does not necessarily secure any benefit to the captain or the owners of the schooner. The person who has an interest in the property insured cannot for that reason alone be entitled to the amount covered by the policy in case of a loss. The right to recover in such event must depend upon the interest acquired as a party to the contract." Where a factor had effected insurance on cotton consigned to him which the owner had ordered not to be insured, it was held that he could not recover on the policy. *Lambeth v. Western M. & F. Ins. Co.*, 11 Rob. La. 82. And in *Frierson v. Brenham*, 5 La. Ann. 540, the court say that it is "a well-settled principle in the law of insurance, that an insurance for account of whom it may concern is not only to be limited to those who have an insurable interest in the property, and may be lawfully insured, but must be also restricted to those for whom the insurance was in fact intended, and by whom it was previously directed or authorized, or subsequently in due season adopted." In *Newson's Adm'r v. Douglas*, 7 Harris & J. 417, the court say, per *Buchanan*, C. J. (p. 450): "But 'whom it may concern' is a technical phrase, common to policies of insurance, and is understood to mean, not any and every body who may chance to have an interest in the thing insured, but such only as are in the contemplation of the contract." And again (p. 452): "For no one can, by subsequent adoption, avail himself of such a policy, who was not at the time in the contemplation of the party procuring the insurance, and for whose benefit it was not intended, notwithstanding any interest he may have had in the thing insured." In *Seamans v. Loring*, 1 Mass. 127, one of the questions was, Where did the policy attach? And Mr. Justice *Story* declares the law to be, that "the assured must have a subsisting interest at the time when the policy by its terms would attach, otherwise it will be void for want of an insurable interest. Such an interest, subsequently acquired, would not" avail. See also *Birdsey v. City F. Ins. Co.*, 26 Conn. 165; *Peabody v. Washington County M. Ins. Co.*, 20 Barb. 339; *Alliance Mar. Ins. Co. v. La. State Ins. Co.*, 8 La. 1, 11; *Protective Ins. Co. v. Wilson*, 6 Ohio St. 553; *Crosby v. N. Y. Mut. Ins. Co.*, 5 Bosw. 369. In *Saddlers' Co. v. Badcock*, 2 Atk. 553, Lord *Hardwicke* says: "I am of opinion, it is necessary the party insured should have an interest or property at the time of the insuring, and at the time the fire happens," in order to bring an action. And the interest must be averred in the

acquired subsequently to the execution of the contract. So that the same policy may cover many successive cargoes in the course of a trading voyage, and save to the owners the trouble of effecting a new insurance, or making a new indorsement for each new cargo. Whether the same principle applies to the changing of ownership of vessels is a different question; though it has been said that "there is strong color for the doctrine that the party intended to be insured will be protected if he had an interest at the time of the loss, without any express stipulation to that effect, although he had no interest at the commencement of the risk."¹

Still the weight of authority requires an interest both at the beginning of the risk and at the time of the loss.² However this may be, it has been held that it is competent for the parties to a policy so to contract that, under the words "for whom it may concern," the interest of every successive owner of the property may be covered; and whoever may be the owner at the time of the loss be entitled to his action on the policy. Hence, in an action on such a policy, the declaration need not aver that the plaintiff was interested at the time the contract was made or at the commencement of the risk, but only that he was interested at the time of the loss.³

The clause "for whom it may concern" (or any similar phrase) lets in evidence to prove whom it did concern, and they only have an interest in the policy; and they may bring an action upon it.⁴

declaration. *Fowler v. N. Y. Indem. Ins. Co.*, 26 N. Y. 422. This was a complaint by the assignee of a policy. The complaint averred the assignment of the policy with the consent of the insurers, &c., but did not aver any interest of the plaintiff or his assignor in the subject insured; for which defect it was held bad on general demurrer. See *Rollins v. Columbian M. F. Ins. Co.*, 5 Foster, 200; *Paradise v. Sun Mut. Ins. Co.*, 6 La. Ann. 596.

¹ *Henshaw v. Mut. Safety Ins. Co.*, 2 Blatchf. 99.

² *Seamans v. Loring*, 1 Mass. 127; *Hancox v. Fishing Ins. Co.*, 3 Sumn. 132, 140; *Rider v. Ocean Ins. Co.*, 20 Pick. 259.

³ *Henshaw v. Mut. Safety Ins. Co.*, 2 Blatchf. 99.

⁴ A ship was insured "on account of —," and the person whose interest was intended to be covered brought an action, proved his interest, and recovered. The court say: "It is the constant practice to show by proof *aliunde* the real owner, when the insurance is general for whom it may concern. The *blank* here is equivalent." *Burrows v. Turner*, 24 Wend. 276. In *Pacific Ins. Co. v. Catlett*, 4 Wend. 75, the words of the policy were: "L. B. & Co., on account of owners, do make insurance," &c. The owners were admitted to prove their interest; and the court say: "It being an open policy,

But one bringing an action on a policy may recover for all of his interests which were intended to be insured, although they were

the insured are bound to prove that they were owners, and had an interest in the cargo." And at a previous argument of the same case, 1 Wend. 561, the court uses the following language: "Nor if it be admissible to show by extrinsic evidence that the term 'cargo,' as used in a policy, means not the whole cargo, but an undivided share or interest therein, why is it not competent to show, by the same species of evidence, that the word 'owners' in a policy was not intended to embrace all the owners, but such of them only as caused the insurance to be effected? The evidence contradicts the policy as much in one case as in the other. But in truth it is no contradiction: it is only reducing to certainty that which was left uncertain by the general phraseology of the policy." And the judgment of both courts was that the evidence ought to be admitted. See also the same case, 1 Paine, C. C. 594, where the court, per *Thompson, J.*, says, with reference to the phrase "for account of owners": "It must of course be open to explanation by extrinsic evidence." In *Shawmut Sugar Refining Co. v. Hampden Mut. Ins. Co.*, 12 Gray, 540, a policy was issued insuring "K. and others." The plaintiff corporation, of which K. was a member, claimed to be the party in interest. At the trial a formal verdict was taken, by the direction of the court, for the plaintiffs, to the amount of the premium only. To this the plaintiffs excepted, on the ground that upon the evidence produced the jury could properly find that they were the parties in interest. And the court say: "Upon examination of the policy, it becomes at once apparent that, while

its objects and purposes are distinctly developed, and all the stipulations contained in it are expressed in clear and intelligible terms, it is necessary to resort to some external proof to ascertain who are the contracting parties. Words are used in this contract which may be applied with equal propriety to many different persons. It is an ambiguity which needs explanation, and which the law allows to be explained. For the purpose of determining who takes, or is entitled to take, an interest in any written instrument, every material fact that will enable the court to identify the person mentioned in it is admissible in evidence. The words "P. E. Kingman and others," in the policy, are obviously indefinite and uncertain. But this is no reason why the real party in interest, whoever he may be, should lose his rights under the contract; and the law accordingly allows him to remove this uncertainty by any legal and competent proof." And the Supreme Court sustained the exceptions. In *Sunderland Mar. Ins. Co. v. Kearney*, 6 Eng. L. & Eq. 312, 16 Q. B. 925, the phrase was that the insured was "interested in, or duly authorized, as owner, agent, or otherwise." In *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238, the declaration recited a policy made with S. C. M. and B. under the name of S. and others, and the policy offered in evidence was with S. and others, without mentioning the names of C. M. and B. But evidence was introduced tending to show that C. M. and B. were jointly interested with S. in the property insured, and were the persons intended by the term "others." A verdict was given for the plaintiff; and on

different in their character.¹ A policy "for —" has been

exception there was held to be no variance, and the plaintiff recovered. But the authorities on this point are no less numerous than unanimous. See the following: *Waters v. Monarch L. & F. Ins. Co.*, 5 Ellis & B. 870, 34 Eng. L. & Eq. 116; *Dunton v. Sun Ins. Co.*, 12 La. Ann. 486; *Augusta Ins. Co. v. Abbott*, 12 Md. 348, 372; *Newson's Adm'r v. Douglas*, 7 Harris & J. 417, 450, 8 T. R. 13; *Frierson v. Brenham*, 5 La. Ann. 540; *Lee v. Mass. F. & M. Ins. Co.*, 6 Mass. 208; *Finney v. Fairhaven Ins. Co.*, 5 Met. 192; *Haynes v. Rowe*, 40 Me. 181; *Crosby v. N. Y. Mut. Ins. Co.*, 5 Bosw. 369; *Walsh v. Washington M. Ins. Co.*, 32 N. Y. 427.

¹ Such seems to be the doctrine laid down in *Pacific Ins. Co. v. Catlett*, 4 Wend. 75, per *Walworth*, Chancellor: "If the policy is *in behalf of the owners*, no other person than the owner can recover, although he may have an interest in the subject by lien, respondentia, or otherwise." In *Carruthers v. Sheddon*, 6 Taunt. 14, the plaintiff as agent had effected insurance for the firm of D. & Co. It appeared in evidence that, besides the firm, several other parties were associated with them in the adventure; that D. & Co. were interested in seven sixteenths of the adventure, and besides had an interest in the whole as consignees. *Gibbs*, C. J., thought that, "if the insurance was intended to be on the interest of D. & Co. only, they had an insurable interest upon which they might recover under this policy beyond their seven-sixteenths part, to the amount of all the advances they had made for the benefit of the other partners, and for which they had a lien on the cargo; and that, as consignees of the cargo, they had an insurable interest

to the whole amount, for that a consignee may insure as well as a principal." The jury found that by the words "D. & Co." all the parties concerned in the adventure were intended, and found a verdict for the plaintiffs for the whole amount insured. Finally, after an argument to enter a nonsuit, the court "was unanimous that D. & Co. might protect all their species of interest under one policy, and that it was unnecessary to express in the policy the nature of the several interests which they possessed, nor were they bound to make any election." And the court all agreed that the verdict was right. In *Oliver v. Green*, 3 Mass. 133, the plaintiff owned one half of the vessel insured, and had chartered the other half for eighteen months, agreeing to pay to the other part owner \$1,800 if the vessel were lost during that time. The plaintiff had procured insurance to the amount of \$3,000 on the vessel. The defendant objected that the plaintiff could recover only one half of the sum insured. But the court said, per *Parsons*, C. J.: "By virtue of the contract [of charter] the plaintiff had a special property in the chartered moiety, which was at his risk during the term. The contract was fair and legal, and the plaintiff might indemnify himself against the loss by causing himself to be insured. When the schooner was lost, he lost the whole of her; of one moiety he was the absolute owner, and of the other he was the special owner, being liable to pay for her at an agreed price. We are therefore of opinion that the plaintiff is entitled to recover of the assurers the sum insured on the vessel." In *Millanden v. Atlantic Ins. Co.*, 8 La. 557, where the policy was against loss by

held to mean the same thing as a policy "for whom it may concern."¹

Where more than one party is insured by a policy, and an action is brought in the name of the assured, for the benefit of all interested, and one or more of them withdraw his or their authority to prosecute the suit, it may then be carried on for the benefit of those who authorize it.² And we should say generally, that where a policy is effected for more than one party, and any of

fire on the "goods, stock in trade," &c., of the plaintiff, it was held that the policy covered goods in stores bought on joint account and sold for the mutual profit of the insured and another person, the former being also in advance on the adventure. See also *Murray v. Columbian Ins. Co.*, 11 Johns. 302; *Aldrich v. Equitable Ins. Co.*, 1 Wood. & M. 272.

¹ This was held in *Turner v. Burrows*, 8 Wend. 144, by the Court of Errors. In the policy in this case there were several blanks, as follows: "Burrows, on account of —, do — make insurance, and cause — to be insured," &c. Chancellor *Walworth* says: "I see no objection which could arise to the filling the blank in this policy with the names of any persons who are legally entitled to the benefit thereof; and if the words 'for whom it may concern' were inserted in the blank, they could not have extended its legal effect any further. . . . I shall, therefore, treat this policy as one in which the person who procured it to be underwritten had authority to insert the names of all or any of the owners of the brig who had any interest in the policy, or to fill up the blank with the words *whom it may concern*." And in *Burrows v. Turner*, 24 Wend. 276, the Supreme Court, per *Cowen, J.*, use the following explicit language: "It is the constant practice to show by proof *ali-*

unde the real owner, when the insurance is general for whom it may concern. The *blank* here is equivalent."

² *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198. In this case the vessel insured was owned by the plaintiff, the master, A, & B; and the plaintiff effected insurance on her in his name for whom it might concern. After loss, action was brought by plaintiff for the parties interested, whereupon the master executed a sealed instrument, revoking the authority of the plaintiff to carry on the action for him. But the court held that the master could not thus put a stop to the proceedings; and they say: "He might well prohibit the plaintiff from maintaining the suit for his proportion of the loss; but the policy was in the name of the plaintiff. The action is brought by him for the benefit of himself and the other owners; and it would be manifestly unjust that one owner, having received payment for his part of the loss, having compromised with the underwriters, or being unwilling to litigate the claim, should have the power to defeat the legal rights of the others." The master "could not annul the authority which the other owners had given to sue for them, much less the right which he [the plaintiff] had to maintain the action in his own name for his own benefit."

them refuse to authorize a suit, it may be begun and maintained by the others for their own benefit.¹

Many questions have arisen as to the rights of the mortgagor and mortgagee to bring their action. We have seen that either possesses an insurable interest, and may therefore be insured.² But either may be insured for his own benefit alone.³ If a mortgagor is insured for his own benefit, the mortgagee has no interest in that policy, and cannot sue upon it either in law or in equity.⁴ But the mortgagor may make the policy for the benefit of the mortgagee, and then the mortgagee may adopt it;⁵ but the general principles which have been already stated respecting agency, authority, and ratification would be applied here.

¹ This seems a necessary inference from the case cited in the preceding note; and is certainly within the reasoning of the court in that case.

² See *Motley v. Manuf. Ins. Co.*, 29 Me. 337, and cases there cited; and the chapter on Insurable Interest.

³ See chapter on Insurable Interest.

⁴ This was held in *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507. Objection was made to the competency of a witness, on the ground that he was interested in the recovery by Lawrence, the insured. It appeared that the witness, Howard, had, together with the insured, bought the property insured, giving back a mortgage on the premises; and that Howard had afterwards contracted to convey his interest to Lawrence, subject to various liens, and to the above-mentioned mortgage. Howard, it was insisted, was still personally liable for the payment of the mortgage debt, and consequently interested in the recovery on the policy. At the trial before the Circuit Court, the objection to the competency of Howard was overruled; and now, when the case comes before the Supreme Court on error, that court, per Mr. J. Story, say: "It is insisted that the proceeds of the policy, if recovered,

will go *pro tanto* in discharge of the mortgage debt. Assuming that Howard is personally liable for that debt, still, unless the creditors have not merely a lien on the premises, but a lien on the policy for it, Howard has no interest which renders him incompetent in this suit. Now we know of no principle of law or of equity by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged property, in case of a loss by fire. It is not attached, nor an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."

⁵ As was done in *Jackson v. Farmers' Mut. F. Ins. Co.*, 5 Gray, 52; and in *Motley v. Manuf. Ins. Co.*, 29 Me. 337. In both these cases the insurance was effected by the mortgagor, and the loss made "payable to the mortgagee"; and in the latter the mortgagee brought the action on the policy in his own name, and recovered, — bringing the action being held to be a sufficient ratification by the plaintiff of the act of those who procured the insurance for his benefit. See this case more fully cited, *ante*, p. 447, n. 1.

A mortgagee, while he may cause himself to be insured for his own benefit, has no right to do this at the expense of the mortgagor, and therefore cannot charge the premium to the mortgagor,¹ unless he authorizes him to do so.

If the policy be in the name of two or more as jointly insured, and only one of those thus named has any interest in the subject-matter of such insurance, it has been said that he may sue alone.² But he can have this power only where the policy is so worded as to cover his interests.³

If two or more are insured in one policy, and a joint action is brought, the plaintiffs are not confined to the proof of their joint interests; but the several and separate interests of each of them may be proved.⁴

¹ *Saunders v. Frost*, 5 Pick. 259, was a bill in equity brought by subsequent mortgagees to redeem the land from prior mortgages. The defendant resisted, on the ground that the plaintiffs had not tendered enough, and claimed as one of his charges, which the plaintiffs were bound to pay, the sum of \$ 6.75 for insurance. Contending that, in case of loss, the mortgagor and his assigns would have the benefit of the sum paid by the underwriter, which would be applied to the mortgage debt. But the court ruled distinctly that the defendant was "not to be allowed for insurance."

² *Marsh v. Robinson*, 4 Esp. 98. The policy was effected in the names of E. M. & Son; but the action was brought in the name of the son only. There was an averment in the declaration that the son was solely interested. *Le Blanc, J.*, was of opinion that this averment let in the plaintiff to prove a sole interest in himself, notwithstanding the policy bore the joint names of two. And the plaintiff failed to recover, only because of the want of some formality required by statute as evidence of ownership.

³ This seems to follow from the well-

settled principle that a party bringing an action on the policy must be interested, not only in the property, but in the policy also. See *supra*, p. 458, n. 2. And see *Graves v. Boston Mar. Ins. Co.*, 2 Cranch, 419, where it was held that one interested in the property, and intended to be insured by the policy, could not bring an action thereon, nor recover in any way at law or in equity, because neither was he insured by name, nor was there any general clause in the policy as "for whom it may concern," under which his interest could be included.

⁴ *McCormick et al. v. Ferrier, Hayes & Jones*, 12. This was an action of assumpsit on a policy of insurance for the benefit of the plaintiffs. The separate interest which each had was not specified. A joint interest had not been averred in the declaration, but merely an interest generally. A verdict was found for the plaintiffs to the full amount insured, which was afterwards, on a motion to set aside the verdict, sustained. The court say: "It has been urged that the verdict is against law, because the interest insured was a joint interest, and that proved was a separate interest. . . . But, supposing

Various questions have arisen as to the right of an assignee. A general and familiar rule of the common law is, that the assignee of a chose in action must bring his action in the name of the assignor, and this has been applied to the assignee of a policy of insurance,¹ even where the policy had provided that the interest of the assured should not be assigned without the consent of the corporation, and such an assignment was made with the consent of the insurers.² It is not so in Louisiana, for there the assignees

that the interest must be joint, the action was still maintainable; because it is admitted that there was a joint interest as far at least as £ 50. Then the question is, Has justice been done? . . . The policy was effected for both; the defendants have not been obliged to pay more than they ought; the plaintiffs have not received more than they were entitled to; and the defendants undertook that they should receive so much. The defendants also have not been able to show any authority that distinct and separate interests cannot be insured in one policy." It is worthy of note, however, that in this case there was a joint interest to some extent.

¹ *Hobbs v. Memphis Ins. Co.*, 1 Sneed, 144; *Jessel v. Williamsburg Ins. Co.*, 3 Hill, 88; *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221; *Granger v. Howard Ins. Co.*, 5 Wend. 202; *Peoria M. & F. Ins. Co. v. Hervey*, 34 Ill. 46, 62; *Conover v. Mut. Ins. Co.*, 3 Denio, 254; *Bayles v. Hillsborough Ins. Co.*, 3 Dutch. 163. In this case the policy had been assigned by the insured to the plaintiff as collateral security on a bond. The Chief Justice, in his opinion, says that there is no averment of a new contract between the assignee and the insurers; but that "the action is clearly founded on the original covenants of insurance, and cannot be maintained by the assignee." And in the same case, *Urdenburgh, J.*, says: "The

policy not being assignable at common law, the plaintiff must show statutory authority for it. In *N. H. Savings Bank v. Union Mut. F. Ins. Co.*, 38 N. H. 282, the plaintiffs, as assignees of a policy, brought the action against the defendants, who were the insurers. The policy had been assigned as collateral security for a mortgage and note to the plaintiffs. The court say, per *Bell, J.*: "The assignee cannot ordinarily maintain a suit in his own name. His rights must be enforced in the name of the assignor." And as no new contract appeared to have been made between the insurers and the assignees, the court held that the plaintiff could not recover in this action, but must sue in the name of the assignor. See also *Flanagan v. Camden Mut. Ins. Co.*, 1 Dutch. 506; *Folsom v. Belknap Co. M. F. Ins. Co.*, 10 Foster, 281, cited *post*, p. 459, n. 3.

² *Hobbs & Henley v. Memphis Ins. Co.*, 1 Sneed, 444. In this case *Hobbs & Henley*, partners, were insured; and *Hobbs*, before the loss, assigned all his interest in the subject insured to *Henley*, with consent of insurers. The action was sustained; though it should be observed that the joinder of the plaintiffs, who had ceased to have a joint interest in the property, was directly contrary to other cases, one of which is *Howard v. Albany Ins. Co.*, 3 Denio, 301. In *Jessel v. Williamsburg Ins. Co.*, 3 Hill, 88, where the policy

may bring the action in their own name.¹ And in some of our States the statute authorizes, and in some cases requires, assignees of choses in action to bring the action in their own name, subject, however, to all the equities of defence which would be applied if the action was in the name of the assignor.² Hence, the change is only in the form of the action, and not in the effect of it.

As an exception to the rule, that the assignee must bring his suit in the name of the assignor, there is a rule that, where the party making the promise consents to the assignment, and thereupon makes a promise to the assignee, the assignee may have an action in his own name. This has been applied to policies of insurance.³

contained the clause mentioned in the text, the insured assigned his interest with consent of the insurers, and the assignee sued in his own name. The court held that the action should have been brought in the name of the assignor; and the plaintiff was nonsuited. And the court said that the only case in which the assignee could sue in his own name was where "the defendant had expressly promised the assignee to respond to him."

¹ *Hermann v. Louisiana St. Ins. Co.*, 7 La. 502.

² In New York, Alabama, Pennsylvania, and Louisiana at least.

³ And there are many cases in which the consent of the insurers to the assignment has been held in itself to be a sufficient promise to the assignee to enable him to sue, notwithstanding *Jessel v. Williamsburg Ins. Co.*, 3 Hill, 88. This is laid down in *Wilson v. Hill*, 3 Met. 66, per *Shaw*, C. J.: "If, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee. . . . And the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are

a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee." See *Phillips v. Merrimack Mut. F. Ins. Co.*, 10 Cush. 350; *Flanagan v. Camden Mut. Ins. Co.*, 1 Dutch. 506; *Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 21. In *Folsom v. Belknap Co. Mut. F. Ins. Co.*, 10 Foster, 231, it was said that if the charter or by-laws of a mutual company contain a provision that an assignee may become a member of the company, if the assignment is made and ratified, he may sue in his own name. But in this case, there being no such provision, it was held that, although the assignment had been agreed to, yet the action should have been brought in the name of the assignor. In *Bodle v. Chenango Co. Mut. Ins. Co.*, 2 Comst. 53, A effected insurance in his own name, and then sold part of the subject insured to B, without transferring the policy. The defendants agreed that the insurance might stand. A loss having occurred, a suit in equity was brought in the names of both. Held, that this was the proper and only form of relief, for an action at law would not lie in such a case in the names of both. In *Granger v. Howard Ins. Co.*, 5 Wend. 200, it was held, that if the act of incorporation allows the assignee to sue in

Some policies contain a provision that an assignee, who becomes so with the knowledge and consent of the insurers, may bring an

his own name, in case the subject has been transferred to him, he must aver that he became the purchaser or assignee of the subject-matter insured, and a general averment that he became and was interested in the buildings insured, and that the insured transferred all his right and interest in the policy to him, is not sufficient.

In *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145, a policy was assigned to the plaintiff, with the consent of the company; who, however, reserved to themselves all the rights expressed in the policy regarding premium notes, debts, &c., and were held entitled to set off such claims against the amount due from them to the assignee on the policy. *Shaw, C. J.*, says: "The consent of the defendant company in the present case was essential to enable the plaintiff to maintain his action; and that being given on terms, by his acceptance of it, the plaintiff assents to and becomes bound by these terms." And in *Wiggin v. Am. Ins. Co.*, 18 Pick. 158, where the facts were nearly the same as in the preceding case, the court say: "Generally, in the case of an assignment of a chose in action, a new demand against the assignor, arising after notice of the assignment has been given to the debtor, cannot be set up against the assignee. But in this case the defendants assented to the transfer of the policy only upon a reservation of their rights expressed in the policy." And the court go on to say that, whatever claims the defendants had against the original assured, they would be entitled to set off the same against the assignee. In *Kingsley et al. v. N. E. Mut. F. Ins. Co.*, 8 Cush. 393, a policy issued to the

owner of buildings insured was by him assigned, with the assent of the company, to a purchaser of the premises, who mortgaged back the premises to his grantor, and with the assent of the company reassigned the policy to him as collateral security. The buildings were burned. It was held that the original assured might maintain an action on the policy in his own name, and the court say: "If, as the defendants admit, the plaintiffs' assignment to C. [the grantee of the premises] authorized him [C.] to sue in his own name, we do not see why his [C.'s] assignment to them does not authorize them to sue in their names." In *Rollins v. Columbian M. F. Ins. Co.*, 5 Foster, 200, the act incorporating the company provided that, upon an alienation of the property insured, the policy should become void, unless it should be assigned to the alienee, with the assent of the company. Before the loss, the plaintiff appears to have mortgaged the premises, and to have assigned the policy to the mortgagees, which assignment was approved by the insurers. The by-laws of the company also provided that a purchaser or mortgagee of insured premises might have the policy assigned to him with consent, &c., whereupon he should be entitled to all the privileges and liabilities of other members of the company. At the trial a nonsuit was ordered; on the ground that the action should have been in the name of the assignee. But the Supreme Court set aside the nonsuit, and held that a mortgage was not an alienation within the act of incorporation; and would not avoid the policy, and so prevent the plaintiff from maintaining this action.

action on the policy in his own name, and this provision applies to an assignment made during the continuance of the risk.¹ Generally, however, in this country, an assignment is prohibited; but this prohibition may be waived, and is so when the insurers indorse their consent to it,² which is often done.

In mutual companies the assignee of a policy usually becomes a member of the company. *Folsom v. Belknap Co. M. F. Ins. Co.*, 10 Foster, 231; *Flanagan v. Camden M. Ins. Co.*, 1 Dutch. 506; *Barnes v. Union M. F. Ins. Co.*, 45 N. H. 21.

¹ For the provision would be nugatory, if it referred only to assignments made after the loss; in which case the assigns have only a "right to recover a sum of money actually due, which, like the assignment of any other chose in action, would give the assignee an equitable interest, and a right to recover in the name of the assignor." Per *Shaw, C. J.*, in *Wilson v. Hill*, 3 Met. 66. And the point was expressly decided in *Courtney v. N. Y. City Ins. Co.*, 28 Barb. 116; *Brichta v. Lafayette Ins. Co.*, 2 Hall, 372; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 79; *Mellen v. Hamilton F. Ins. Co.*, 17 N. Y. 609. "The reasons for prohibiting the assignment of the policy without the consent of the company, during the continuance of the risk, are supposed not to exist after the loss takes place, which fixes the liability of the defendant; and of course he can receive no detriment by a change of ownership of the claim, especially as the company can set up the same defences against the assignee as they could against the assured." *Carter v. Humboldt F. Ins. Co.*, 12 Iowa, 287. In *Peepke v. Resolute F. Ins. Co.*, 17 Wis. 378, it was held that the assignee took the policy subject to all the equities that existed between the insurers and the assignor. See also *Goit v. Na-*

tional Protective Ins. Co., 25 Barb. 189; *Rogers v. Traders' Ins. Co.*, 6 Paige, 583, 599.

² This is in accordance with the general principle that any one may renounce the benefit of a stipulation introduced entirely in his own favor. *Coddington v. Davis*, 3 Denio, 16-21.

And a clause against assignment without consent of insurers is null after loss has happened and the risk is ended. *Carter v. Humboldt F. Ins. Co.*, 12 Iowa, 287. In *Goit v. National Protective Ins. Co.*, 25 Barb. 189, the policy contained a clause to the effect that the liability of the company should cease in case the policy should be assigned without their consent, "either prior or subsequent to loss." The policy was assigned after loss, and without consent of the insurers. The court held the condition invalid, and said: "The contract of insurance is one eminently of personal confidence, and the character of the insured forms an important element among the inducements of the underwriters to assume the risk. . . . There is certainly not the same reason for prohibiting an assignment after a loss, as before. After a loss, the confidential relation of insurer and insured no longer exists, but a new relation, . . . to wit, that of debtor and creditor." The court go on to say that it is necessary that the insured should be able after loss to get his indemnity as soon as possible, without being compelled to wait upon the caprice of the insurers; and that it is the policy of the law to place all the property of a debtor, not

As no action can be brought but by one interested in the policy,¹ so, if a part owner insures in his own name, this will be construed to be an insurance of his own interest in the ship;² and unless it

excepting insurance claims, within the reach of the creditors. And they conclude by declaring that "the contract of insurance proper terminated with the loss, and the provisions relied on ought not to be allowed to defeat this claim." This case was approved in *Courtney v. N. Y. City Ins. Co.*, 28 Barb. 116. But it was also held in *Day v. Poughkeepsie Ins. Co.*, 23 Barb. 623, that if the parties choose to make such a bargain they are bound by it.

¹ See *supra*, p. 451, n. 1.

² In *Finney v. Warren Ins. Co.*, 1 Met. 16, the plaintiff effected insurance on a vessel in his own name, but did not mention, nor did the defendants know till after the loss, who were interested. It appeared that the plaintiff owned one eighth in his own right, and three eighths as administrator; there were several counts, in one of which the plaintiff claimed for an entire loss, in others for his individual interest in one eighth, and for his interest as administrator, &c. The court held that the plaintiff could recover for his own interest and for his interest as administrator, that is, one half of the loss. But that the circumstance that the plaintiff kept the accounts of the vessel, was ship's husband, &c., gave him no insurable interest in the other one half, nor any right to insure for the other part owners without their authority. And the court say: "This is not on the face of the policy for another part owner, but for the plaintiff himself. . . . He did not purpose to effect insurance for the benefit of the other owners, or for whom it might concern, but for himself. The contract must be construed according to

its clear provisions." In *Finney et al. v. Bedford Com. Ins. Co.*, 8 Met. 348, the defendants caused one Bates, who was one of the plaintiffs, to be assured on a whaling vessel; and there was no clause in the policy showing that the assured acted as agent. The plaintiffs offered to prove that Bates was the plaintiffs' agent, and was known to be so by the defendants; that Bates owned but a very small part of the vessel; and that it was the intension of all the parties to cover the interest of all the owners. The evidence was rejected, and a verdict taken for the defendants, subject to the opinion of the whole court. Mr. J. Dewey, in giving the opinion of the court, said that the question was not as to the competency of Bates to effect insurance for his associates, but whether upon the face of the policy he had done so. That if Bates had intended to insure them all, he should have put in the policy some such phrase as "for whom it may concern." That when one owner alone is, by the terms of the policy, insured, parol evidence cannot be admitted to vary the written contract and extend the benefit of the insurance to others. And the ruling of the judge at the trial was sustained. But leave was given to amend by striking out the names of all the plaintiffs except Bates. See also *Pearson v. Lord*, 6 Mass. 84; *Murray v. Columbian Ins. Co.*, 11 Johns. 302; *Turner v. Burrows*, 5 Wend. 541. In *Graves v. Boston Mar. Ins. Co.*, 2 Cranch, 419, it was held that an insurance in the name of a part owner "as property may appear," does not cover the interest of another part owner; the words "as property may appear" being

appears that the other part owner was intended to be covered, and had authorized or ratified the insurance as of his interest, the insured cannot charge him with the premium,¹ nor is he liable to him for any part of what he recovers,² nor can the other part owner bring any action.³

If two or more persons are insured in a policy, and the separate interest of each is expressly declared and defined in the policy, each one of them may have his own action for his own interest.⁴

In an English case, the parties to a bond made an agreement considered as applying to the one in whose name the policy issued; and *Marshall*, C. J., said: "The contract ought to have been so expressed as to show that the interest of some other than Graves was secured, if such was to be the effect of the instrument. A policy, though construed liberally, is still a special contract; and under no rule for proceedings on a special contract could the interest of a copartnership be given in evidence on an averment of individual interest, or the averment of the interest of a company be supported by a special contract relating in its terms to the interest of an individual."

¹ See *Taylor v. Lowell*, 3 Mass. 330; *Finney v. Fairhaven Ins. Co.*, 5 Met. 192.

² In *Garrell v. Hanna*, 5 Har. & J. 412, the plaintiff and defendant were joint and equal owners of a vessel, which had been insured to the amount of \$1,500, and was valued at \$2,500. The policy was made in the name of Hanna, and "as well in his own name as for and in the names of all and every other person or persons to whom the same doth, may, or shall appertain in part or in whole," &c. It did not appear otherwise that the policy was effected for the benefit of both, or that there was any ratification by Garrell of the insurance. The vessel was lost, and the \$1,500 paid to Hanna. The

court held that the plaintiff could not recover.

³ Because, though interested in the property insured, he is not in the policy. See *supra*, p. 451, n. 1.

⁴ "When the covenant is made with the covenantees, *et cum quolibet eorum*," these words make the covenant several in respect of their several interests." 1 Saund. 155, n. 2; 2 Leon. 47. Where three persons bound themselves jointly and severally in a bond, and two paid the whole, it was held that they could not join in an action against the third obligor for contribution. *Kelby v. Steel*, 5 Esp. 194. In *James v. Emery*, 8 Taunt. 245, the rule is declared by *Gibbs*, C. J., to be, that, if the interest be joint, the action must be joint, although the words of the covenant be several; and if the interest be several, the covenant will be several, although the terms of it be joint. *Smith v. Hunt*, 2 Chitty, 142. So in *Servante v. James*, 10 Bam. & C. 410, where there was a covenant to pay certain persons a certain sum, "in such proportions as were set against their several names," it was held that each covenantee must sue separately. And see *James v. Emery*, 5 Price, Exch. 529. There is no reason why the contract of insurance should differ from other contracts in this respect, though we are not aware that the question has ever arisen on a policy.

by parol for the payment of the debt by instalments, and the court held that the obligee might bring assumpsit on the parol promise, or, disregarding this, might bring covenant on the bond.¹ If the action is on a policy and is covenant, the policy being under seal, it must be brought in the name of the insured, although he is insured for other persons, and although the insurance is made with phraseology and under circumstances which would permit the action to be brought in the name of those for whom the insurance is made if there was no seal.² But the plaintiff, recovering in covenant, would recover for the benefit of the parties actually interested.³ And it has been held in this country, that where a policy under seal insured one party, but expressly for the benefit of another party, this other may sue on the policy in his own name.⁴

If the insurance be by a part owner, in his own name, the *prima facie* presumption is, that the insurance is for his separate interest, and he would bring the action in his own name, and hold the amount recovered without liability to the other part owners. If, however, the insured be only trustee for another, as he may insure in his own name without specifying his interest, so he may bring the action in his own name;⁵ but whatever he recovers will be

¹ Morton v. Burn, 7 Ad. & El. 19.

² See *supra*, p. 445, n. 2, and Sunderland M. Ins. Co. v. Kearney, 16 Q. B. 295; 6 Eng. L. & Eq. 312, *contra* quoted *supra*, p. 445, n. 1. And De Bollé v. Pa. Ins. Co., 4 Whart. 68; Am. Ins. Co. v. Insley, 7 Pa. St. 223; Shep. Touch. 369, quoted *supra*, p. 441, n. 2.

³ De Bollé v. Pa. Ins. Co., 4 Whart. 68; Am. Ins. Co. v. Insley, 7 Pa. St. 223, quoted *supra*, p. 446, n. 2.

⁴ Maryland Ins. Co. v. Graham, 3 Har. & J. 62, quoted *supra*, p. 443, n. 1.

⁵ In Oliver v. Greene, 3 Mass. 133, the plaintiff procured insurance on a vessel of which he owned one half, and had chartered the other half under an arrangement to pay for that half, should the vessel be lost. Nothing was said in the policy about the plaintiff's interest; but the court held that, as there was

no concealment of any material fact, this did not affect his right to recover. In Locke v. N. A. Ins. Co., 13 Mass. 61, A had borrowed money of B, giving as security a bill of lading of a cargo, with an arrangement that in case of loss B should receive the amount of the insurance which was effected in A's name. Held, that A was entitled to recover the insurance; and the court say, per Parker, C. J.: "We are satisfied, as the law stands, that a *bona fide* equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured, unless there should be a false affirmation or representation, or a concealment after inquiry of the true state of the property." See Bell v. Western M. & F. Ins. Co., 5 Rob. La. 423; Stet-

held bound to the trust.¹ If two or more persons are insured in the same policy, upon distinct interests, which are specified as distinct, we should hold their rights of action to be as distinct as if there were as many policies. But if the policy purports to be in the names of parties who are jointly interested at the time of the loss, the general rule of law to which we have already referred, and which requires that the action be in their names jointly, will apply.² But if two parties, who are jointly interested in property, are jointly insured thereon, and afterwards, but before the loss, one assigns his interest in the property to the other, they can have no joint action on the policy.³

Whoever may be insured, the policy may provide that the loss shall be payable to another party; and it may make this provision either in the body of the policy or by indorsement made with the consent of the parties.⁴ In that case, the party to whom the loss is payable may bring the action in his own name.⁵ But where, on a policy thus made, the party to whom the loss was payable indorsed upon the policy a receipt of the demand against the insured, which the policy was intended to secure to him, it was held that the policy then stood as if this clause were cancelled.⁶ So it would be if, in any way whatever, the party to whom the loss was payable directed that the loss should be paid to the insured.⁷

son v. Mass. M. F. Ins. Co., 4 Mass. 830; *Bartlett v. Walter*, 13 Mass. 267; *Rider v. Ocean Ins. Co.*, 20 Pick. 259; *Finney v. Warren Ins. Co.*, 1 Met. 16.

¹ In *Parry v. Ashley*, 3 Sim. 97, a testator devised property charged with an annuity, and insured, to S. A. in fee, making S. A. his executrix. Soon after the death of the testator, the policy expired, and was renewed by the executrix. The annuity not being paid, the person to whom it was due filed a bill in chancery to get it. Before answer, the insured property was burned; and the plaintiff filed a supplemental bill, praying that the insurance company might be ordered to pay the insurance money into court, and be restrained from paying it to the executrix. The vice-chancellor so ordered, saying: "I must

hold that, *prima facie*, she renewed it in the character in which she was entitled to renew it, namely, as executrix."

² See *ante*, p. 449, n. 1, p. 450, n. 1 and 2.

³ See *ante*, p. 449 and n. 1, p. 450, n. 2.

⁴ In the policy in *Motley v. Manuf. Ins. Co.*, 29 Me. 337; *Rider v. Ocean Ins. Co.*, 20 Pick. 259; *Farrow v. Commonwealth Ins. Co.*, 18 Pick. 53. By indorsement in *Williams v. Ocean Ins. Co.*, 2 Met. 303. These cases are cited *ante*, p. 447, n. 1, p. 448, n. 1.

⁵ See *ante*, p. 447, n. 1.

⁶ *Rider v. Ocean Ins. Co.*, 20 Pick. 259.

⁷ In *Farrow v. Commonwealth Ins. Co.*, 18 Pick. 53, cited at length, *ante*, p. 443, n. 1, the persons to whom the loss was made payable by the policy simply gave their consent to the action brought by the assured, and a certificate to this

If there was a loss under a marine policy, and the insured died before the loss, or after the loss and before payment, the claim would go to the personal representatives of the deceased, like any other personal claim.¹ It is not usual to mention executors, admin-

effect was put into the case. The action was sustained. See *Ennis v. Harmony F. Ins. Co.*, 3 Bosw. 516.

¹ In *Mildmay v. Folgham*, 3 Ves. Jr. 471, a bill in chancery was filed by the heir, to whom certain insured property had descended, to compel the insurers to pay a loss to him. The policy provided that loss should be paid to the insured, her "executors, administrators, or assigns," and it had never been assigned. It was sought to make the executrix a trustee for the money. Lord Chancellor *Loughborough* said: "It is utterly impossible to make the executor a trustee. This is a personal contract, not connected with the real property, not affecting the real property. No person can have the benefit of the policy but the personal representative." And the bill was dismissed. See *Norris v. Harrison*, 2 Mad. 268; *Lynch v. Dalzell*, 3 Bro. P. C. 497. In *Finney v. Warren Ins. Co.*, 1 Met. 16, the plaintiff, who was a part owner, had effected insurance on a vessel to her full value, without specifying his interest. Afterwards one of the owners died, and the plaintiff, being appointed his administrator, recovered the insurance both for his own share of the loss and for that of his intestate. In *Wyman v. Wyman*, 26 N. Y. 253, the plaintiff was administratrix of an estate on which certain insured buildings were burned after the intestate's death. The policies ran to the assured, "his executors, administrators, or assigns," and contained this clause: "The interest of the assured in this policy is not assignable, unless by consent of this corporation, manifest in

writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall be void and of no effect." The insurance money was paid to the guardian of the intestate's children, under a stipulation that he should hold it subject to the direction of the court; and the action was in the nature of a bill of interpleader to try the right of the parties. The Supreme Court decided in favor of the administratrix as against the heirs, and this was an appeal. The Court of Appeals modified the decision of the lower court, and held that the money stood in the hands of the administratrix, not as personal assets, but as realty, subject to dower, and to the lien of creditors by judgment before distribution among the heirs at law. And the court say, per *Emott, J.*: "Policies of insurance against fire, however, are personal contracts with the assured. They are agreements to indemnify him against loss, and not guaranties of the immunity of the property insured. Such contracts do not attach to the realty, nor do they pass as incident to a conveyance or transfer of the title to lands. The contract is made with the assured, 'his executors, administrators, and assigns.' Both by force of these words, and from the nature of the contract itself, the right of action upon the death of the assured vested in his personal representative. It is not easy to see how any one but his administratrix could have sustained actions on these policies for any loss, whether it had occurred before or after the intestate's

istrators, or assigns in the policy, nor would these words make any difference.¹ Where a part of the premium is to be returned by the insurer, this is due to the insured who paid the premium. As a general rule, any party who might sue for a loss, either as nominally insured, or as actually insured, and covered by the policy, may sue for a return of the premium.² In a mutual company, the premiums constitute a fund, for the benefit of all the creditors, which each member, in his character of insurer, is bound to make good; while as insured he is entitled only to a *pro rata* dividend from that fund. Therefore a member of a mutual company cannot, upon its insolvency, set off against premiums that he owes a loss due to him from the company.³

SECTION III. — *Against whom the Action may be brought.*

IF there be double insurance, or an insurance of the same property against the same risk, the insured may sue all the insurers or either of them separately. And the insurer who pays the whole or more than his share may demand contribution.⁴ The

death. . . . It is said by the heirs that the administratrix could not have sustained such an action, because she had no interest in the property insured. It is unquestionable that the assured must have an insurable interest in the premises at the time of the loss. But in the present case the title and interest in the lands passed to the heirs; yet, as we have seen, the right of action on the contract vested in the administratrix. . . . Thus the contract of insurance, by the death of Wyman, became by its terms a contract with his administratrix for the protection of the interest of his heirs. . . . The administratrix would thus have sustained her action upon the policy as a person with whom a contract is made for the benefit of another." And the judge goes on to draw a distinction between this case and that of *Mildmay v. Folgham*, 3 Ves. Jr. 471, *supra*.

¹ See opinion of *Emott, J.*, in *Wyman v. Wyman*, 26 N. Y. 253, cited in preceding note.

² *Martin v. Sitwell*, 1 Show. 156. *Martin*, an insurance broker, had effected insurance for B., and had paid the premium; but it turned out that B. had no property subject to the risk, and so the policy was void. It was objected that the action ought to have been brought in B.'s name. "To all which *Holt, C. J.*, answered, that, the policy being in *Martin's* name, the premium was paid in his name and as his money, and he must bring an action upon the loss, and so upon avoidance of the policy for to recover back the premium." Moreover, an objection was made to the form of the action, which was *indebitatus assumpsit*; but the court held the action properly brought.

³ *Lawrence v. Nelson*, 21 N. Y. 158.

⁴ In *Newby v. Reed*, 1 Wm. Blk.

same thing would be true if there were several distinct insurers on the same policy.¹ This was once common in this country, but is now very unusual. Nor is it so common in England as it once was. Still it occurs there so often that it is provided for by a rule

416, it was held, "that upon a double insurance, though the insured is not entitled to two satisfactions, yet upon the first action he may recover the whole sum insured, and may leave the defendant therein to recover a ratable satisfaction from the insurers." In *Lucas v. Jefferson Ins. Co.*, 6 Cow. 635, the defendants insured the plaintiff \$4,000; another company, \$5,500; and a third, \$6,000,—all on the same property. In the policy underwritten by the defendants was the following clause: "In case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount insured shall bear to the whole amount insured on the said property." The other two companies had voluntarily paid the amount of their insurance. *Woodworth, J.*, in giving the opinion of the court, laid down the law as given in *Newby v. Reed*, and said that the clause above quoted would protect the defendants against any claim of the plaintiff beyond a ratable proportion of the loss; so that, in order to get his whole insurance at once, the plaintiff would have to bring his action against one of the companies not protected by such a clause. In *Wiggin v. Suffolk Ins. Co.*, 18 Pick. 145, two policies were made on the same day, on cargo worth \$17,000,—one by the defendants and one by another company, for \$10,000 each. It was stipulated in both policies that they should not be

held to cover any risk already covered by a prior policy; and that the policy, so far as it covered risks not already covered by any prior policy, should not be considered as in any respect affected by any subsequent policy. The two companies agreed to consider the policies as simultaneous. The court, per *Shaw, C. J.*, said: "This is a case of double assurance. . . . The party holding such double assurance may in the outset, and before making any election, consider each debtor as liable to bear a proportionate part of the common burden, and recover accordingly, or he may require either of the parties liable to pay the whole; and then it follows, as a rule of law founded on the broadest principles of equity, that when one of two parties has paid the whole of a debt for which each was originally and ultimately liable, the party who has paid the whole or a disproportionate part of the common debt shall have a remedy against the other for a contribution, so that the burden may be borne equally, according to their respective liabilities." And one of the companies having charged itself with half the loss, and having paid into court the balance of the half, after making certain deductions, which sum had been taken out by the plaintiff, the court held that this action of the plaintiff was *prima facie* evidence that he meant to consider each insurer as liable for one half.

¹ Because they bind themselves severally. This is well settled in practice (see cases cited next note), and is too obvious to have come up for adjudication.

of court, which is called a "consolidation rule," the effect of which is, that one action alone is brought, and that all the suits and rights of action await and abide the results of that one.¹ The same effect would be reached by what is a common practice in this country wherever many cases depend upon precisely similar questions, namely, to bring all the actions and enter them on the docket, one by one, an entry being made on the docket under all but one, referring to that one, and stating that the others would "await and abide" that one. If the word "await" alone were used, its effect, strictly speaking, would only be to delay the other actions until the first was decided. The consolidation rule is peculiar to English practice, but we give a brief account of it in our note.

An action at law may be brought upon an agreement to make out and give a policy.² And it has been held that if, in pur-

¹ For a full explanation of the English Consolidation Rule, see 2 Arnould on Ins. *1277. It was introduced by Lord *Mansfield*, and is briefly this: When a number of actions are brought by the same plaintiff, on the same policy, for the same loss, and on the same risk, against different underwriters (or even on several policies), a rule will be granted to stay proceedings in all but one of the actions, upon application of the defendants, and the consent of the plaintiffs, on condition that the defendants in the other actions agree to be bound by the verdict in the action tried; and that the defendant in this action undertakes not to file a bill in equity or bring a writ of error. The courts act on the principle that the order of consolidation is a favor to the defendants, and regulate their proceedings accordingly. See *Camden v. Edie*, 1 H. Blk. 21; *Foster v. Alvez*, 3 Bing. N. C. 896; *Kynasten v. Liddell*, 8 J. B. Moore, 223; *Doyle v. Anderson*, 1 Ad. & El. 635. But the consolidation rule does not bind the plaintiff. *Doyle v. Douglas*, 4 B. & Ad. 544.

² In *Perkins v. Washington Ins. Co.*,

4 Cow. 645, the plaintiff applied to the agent of the defendants for insurance. The agent agreed that the company should insure, and should execute a policy, &c. The premium and other charges were paid to the agent, who gave a receipt therefor, acknowledging the purpose for which they were paid. Afterwards, and before the premium had been sent to the company, or the policy issued, the property insured was burned. The company, subsequently, upon notice and proof of loss and tender of the premium to their president, refused to execute a policy or indemnify the plaintiff. Chancellor *Kent* decided against the plaintiff, but his decision was unanimously reversed by the Court of Errors. The court held that the acts of the agent were binding on the company. And *Colden*, Senator, said: "It will not be questioned that, if the premium had been paid at the office of the company in New York, and the president or secretary had signed the receipt which was given by Russell [the agent], the insurance would have been as binding as if a policy had been executed." . . . Such receipts

suance of such an agreement, the policy is made out, but not.

"are intended to give immediate effect to the insurance, and supply the place of a formal policy until one can be prepared. It has been decided that these receipts are as binding as a policy could be." But the Senator says that such a receipt can be made available only in chancery. In *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339, the plaintiff applied to the agent of the defendants for insurance on a building, delivered to him the premium note, and made certain cash payments required, including the price of a policy. The agent returned to the plaintiff a certificate reciting the application, payments, &c., and stating that \$ 1,050 "will be insured on the property, if the company approve the said application." The company did not approve the application, but notified the agent that the plaintiff must make certain changes in the building, &c., and when the company should be certified that these requisites had been complied with, they would send him a policy. The plaintiff complied with all the conditions, notified the agent thereof, and requested him to call and see for himself. This the agent did not do. Afterwards the building was burned; whereupon the agent wrote to the insurers, stating that it was through his own neglect that he had not examined the premises. The plaintiff brought his action upon the agreement to give a policy. *Gibson, C. J.*, in giving the opinion of the court, says: "Actions on mere agreements to insure are not uncommon; . . . but it appears that the terms of the contract must have been settled by the concurrent assent of the parties, and that nothing must have remained to be done but to deliver the policy, else the risk will not have been begun; in other words, that the

agreement must have had at some particular instant that *aggregatio mentium* which is indispensable to the constitution of every contract." And he goes on to say that the company were bound by the acts of the agent; that there was no negligence on the part of the plaintiff, but only on the part of the defendants or their agent. And the court held that there was a complete parol agreement for a contract, by which the corporation was bound, and that the plaintiff consequently could recover.

In *Taylor v. Merchants' F. Ins. Co.*, 9 Harris, 390, the plaintiff had received from the defendants proposals of insurance, and had deposited in the mail a letter accepting the terms, after which the property was burned. The plaintiff filed a bill in equity; and the defendants objected that his remedy, if he had any, was at law. This, the court say, per *Nelson, J.*, "may very well be admitted; but it by no means follows from this that a court of chancery will not entertain jurisdiction." In *Rockwell v. Hartford Ins. Co.*, 4 Abbott's Practice, 179, it was held that where there is an agreement to insure and deliver a policy, and a loss occurs before such delivery, it is not necessary that the assured should proceed to compel the delivery of a policy before he can recover the insurance; but he may maintain an action upon the agreement, taking judgment for the amount of the loss, not exceeding the sum insured. So in *Ins. Co. of Valley of Virginia v. Mordecai*, 22 How. 111, an action was brought on a memorandum on the policy, the policy itself not being filled up nor sealed; and the insured recovered. The memorandum was this: "Messrs. M. & Co. are insured in the sum of four thousand dollars on the freight of the bark Susan,

delivered, an action of assumpsit will lie on the contract.¹ So trover will lie for a policy, if it be made out.² And it seems to

hence to Rio Janeiro and back to any port of discharge in the United States. \$4,000 at 2 percent, \$80. June 11, 1855." And there was no attempt in this case to resist the plaintiff's right to bring the action. In *Bunten v. Orient Mut. Ins. Co.*, 8 Bosw. 448, it was held that the insured could recover on an agreement to insure, though the amount to be covered and the rate of premium were contingent; provided the agreement afforded the means of ascertaining them. And on such an agreement the assurers were bound to give a policy on the happening of the contingency, and the insured was bound to pay the premium.

¹ In *Loring v. Proctor*, 26 Me. 18, the court say, that an instrument in writing, to be effectual, must ordinarily be delivered. "But in reference to parol agreements, and as policies are not often, if ever, under seal, everything must depend on the intention and understanding of the parties. They may consent that a writing which is intended to contain the evidence of an agreement between them, though it may be left in the hands of the one party or the other, without any formal delivery of it by either to the other, shall be evidence of their agreement. What the intention of the parties may be, as to a writing prepared between them, in reference to its efficacy, is a question referable to a jury, as matter of fact, and not altogether of law, referable to the court."

In *Blanchard v. Waite*, 28 Me. 51, a policy had been made by the underwriters, and recorded on their books, but had not been delivered. One of the owners of the vessel insured — Loring — had taken the premium note

from the insurance office to get it signed by the other owners. By the time that the note had been signed and delivered to the underwriters, the loss had occurred, and they refused to deliver the policy. It was admitted by the parties, that premium notes often remained in the insurance offices till the risk had terminated; and that cases had occurred, where the papers were not exchanged before loss had happened, but the contracts were held good. The action was assumpsit on the contract. The court held that the plaintiff could recover, and they said: "A contract of insurance is completed when there is an assent to the terms of it, by the parties, upon a valuable consideration. Neither the giving the premium note, nor the reception of the policy by the insured, are prerequisites to its consummation. . . . The note was signed by all the plaintiffs, but not presented at the office until after the loss. This act, together with the commencement of the suit, must be considered a ratification of what Loring did in procuring the insurance." But if the action is brought upon a policy, and not upon an agreement to insure, the policy must be complete and fully executed. *Peoria M. & F. Ins. Co. v. Walser*, 22 Ind. 73. Where a court of equity has acquired jurisdiction of the case, it will proceed and give final relief, and not turn the party over to an action at law on the policy. *Tayloe v. Merch. F. Ins. Co.*, 9 How. 390; *Union Mut. Ins. Co. v. Commercial Mut. M. Ins. Co.*, 2 Curt. C. C. 524; 19 How. 318.

² This is laid down in all the textbooks; but, so far as we know, the only case on the point is that of *Harding v. Carter*, cited in next note.

have been held that, where an agent wrote that he had effected a policy, and had not done so, trover would lie.¹ We should have some doubts, however, whether such action could be maintained under such circumstances.

Policies frequently stipulate that the insurers shall not be bound to pay the loss until a certain period elapses, which is usually sixty days or ninety days after proof of loss. The parties have, of course, a right to make this stipulation, and are therefore bound by it; but it is open to construction. The first question is, What is meant by proof of loss? The insurers are not bound to pay at all without proof of loss; but when we say this we mean that they are not bound to pay unless there be sufficient evidence of the loss to charge them with the liability, and, if need be, found a judgment against them. But this is certainly not the meaning of the phrase "proof of loss" in this stipulation. Much less than legal and complete proof is sufficient to begin the period at the end of which the insurers are to pay.²

¹ *Harding v. Carter*, Park. Ins. ch. 1, p. 4. In this case, Lord Mansfield held, that the defendants, who were brokers, must be considered the actual insurers. It was said, for the defence, that the letter was written by a clerk, by mistake; and that trover could not be maintained for that which never existed. But the court would not suffer the defendants to contradict their own misrepresentation.

² *Norton v. Rensselaer & Saratoga Ins. Co.*, 7 Cow. 645. In this case, the court say, that "no more information has been required of the party than appeared to be within his control." And in *Lenox v. United Ins. Co.*, 3 Johns. Ca. 224, the court say, per *Thompson, J.*, of the clause requiring preliminary proof: "I cannot think it [the clause] ought to receive a construction that will impose on the insured the necessity of producing the same proof, preliminarily, that would be requisite on the trial to entitle him to recover." And, in the same case, *Radcliff, J.*, says: "The parties

in this case could not mean legal proof, which can only be taken in a course of legal proceeding." See also *Savage v. Corn Exch. Ins. Co.*, 4 Bosw. 1. But no action can be maintained by the insured, until the notice and proof required by the policy have been given. Nor can a company be charged as trustees of the insured, in an action begun after loss, but before notice and proof have been given. *Davis v. Davis*, 49 Me. 282. So where, besides notice of loss, there was required a certificate from the churchwardens, &c., importing "that they knew the character of the assured, and believed that he did sustain the loss, and without fraud," it was held that no action could be maintained, until such certificate had been procured, even if the churchwardens, &c., wrongfully refused to give it. *Worsley v. Wood*, 6 T. R. 710. Nor will a right of action, which has been barred by a condition, that actions shall be brought within a certain time after loss, be revived by an acknowledgment or a new promise. *Williams v. Ver-*

The clause has always been, both in practice and in adjudication, liberally, though somewhat variously, construed.¹ In a case in New York, Chief Justice Thompson said, this clause "is construed to require only the best evidence which the party possessed at the time."² This cannot be literally true; for it would require of the insured nothing more than that when he communicates the fact of the loss, he should give his reasons for the communication; and, whatever they were, the period would begin.

The insured may make, and it may be proper that he should make, an abandonment upon much slighter evidence than would satisfy the requirement of this clause. Indeed the very reason given by Chief Justice Thompson for the above statement would show that it needs some limitation. He says that the clause which makes this preliminary proof necessary, before payment of the loss can be demanded, "requires only reasonable information to be given to the underwriters, so that they may be able to form some estimate of their rights and duties before they are obliged to pay."³ But the best evidence which the party possesses at the time may be insufficient to give this information. The insurer is undoubtedly entitled to all the evidence, or documents, which the insured has.

The question of the admissibility of any document in an action on the policy does not bear upon this question; for if a document be material, in reference to the information which the insurers ought to have, they are entitled to it, although it would be legally inadmissible as evidence in a trial.⁴ Usually the insured gives to

mont Mut. F. Ins. Co., 20 Vt. 222. But see and compare with *Worsley v. Wood*; *Stout v. City F. Ins. Co.*, 12 Iowa, 371.

¹ See *Norton v. Rensselaer & Saratoga Ins. Co.*, 7 Cow. 645; *Lawrence v. Ocean Ins. Co.*, 11 Johns. 241, 260. In *Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26, the court say, per *Sandford, J.*: "The 'proof of loss' required by the policy, preliminary to the obligation to pay, is not legal proof, such as would be competent to carry the cause to the jury, on the question at issue." *Talcot v. Mar. Ins. Co.*, 2 Johns. 130; *Barker*

v. Phoenix Ins. Co., 8 Ib. 307; *Lycoming Co. Mut. Ins. Co. v. Schollenberger*, 44 Pa. St. 259; *Rogers v. Traders' Ins. Co.*, 6 Paige, 583; *Walsh v. Washington M. Ins. Co.*, 32 N. Y. 427.

² *Lawrence v. Ocean Ins. Co.*, 11 Johns. 241, 260. See preceding note.

³ *Lawrence v. Ocean Ins. Co.*, 11 Johns. 241, 260.

⁴ *Thurston v. Murray*, 3 Binn. 326; *Flindt v. Atkins*, 3 Campb. 215; *Sexton v. Montgomery Co. Mut. Ins. Co.*, 9 Barb. 191. In these cases an attempt was made to put in as evidence, at the trial, documents which had been given

the insurer the protest of the master, the surveys and all communications which have been received from him, or from any quarter,¹ and, if the insurance be on the cargo, the bill of lading and invoice should be given.²

to the assurers as preliminary proofs of loss, and they were ruled inadmissible. In *Am. Ins. Co. v. Francia*, 9 Pa. St. 390, a question was made as to whether a protest, somewhat irregular in form, was properly given to the assurers, as one of the preliminary proofs. With reference to this, the court say, per *Gibson*, C. J.: "In *Fleming v. The Mar. Ins. Co.*, we certainly laid a strong hand on protests, as proofs, under the idiosyncrasy of our system, of facts before a jury; not, however, to affect them as preliminary proofs." In *Fleming v. Mar. Ins. Co.*, 3 Watts & G. 144, *Gibson*, C. J., says, that only in Pennsylvania is a mariner's protest evidence for the jury of the facts set forth in it; but everywhere else it is only one of the preliminary proofs. He says that the Pennsylvania rule originated in ignorance, and is mischievous in its tendencies. "A protest is the act of the master and some of his people, all of whom are answerable to the owners for negligence, when it has existed; and it is, consequently, their interest to saddle the insurers with the consequences of it."

¹ *Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26. So an abandonment may be made on the information which the insured have received of the loss, and before they are in possession of the protest. *Craig v. United Ins. Co.*, 6 Johns. 226, 249. In *Norton v. Rensselaer & Saratoga Ins. Co.*, 7 Cow. 645, it was held, that, where all the papers relating to the goods insured were burned up with the goods, a statement of the gross amount lost, with circumstances of the loss, were sufficient. In *Haff v. Mar. Ins.*

Co., 4 Johns. 132, it was held, that the survey was a necessary part of the preliminary proof. In *Munson v. N. E. Mar. Ins. Co.*, 4 Mass. 88, where the vessel insured had been captured, a letter from her pilot, and a copy of a letter from the master afterwards, were held sufficient; the captain, being a prisoner, could make no protest, "which," the court say, "is the usual evidence, when it can be obtained."

² In *Allegre v. Maryland Ins. Co.*, 6 Har. & J. 408, where the insurance was on the cargo, and the insured delivered to the assurers after loss the protest of the master and the bill of lading, the assurers refused to pay, on the ground that the invoice was a document usually given on such occasions, which was proved to be the case. The court held that the invoice should have been produced, and they say: "The court think that the true construction of this clause of the policy is, that the insured is bound to offer, as his preliminary proofs, such documentary proofs in his possession as are usually required in adjusting a partial loss,—that is, the protest, bill of lading, and invoice, or such equivalent proofs as the nature of the case is susceptible of. These proofs remain with the assured only, or his agent; the burden of producing them therefore rests on him."

In *Lenox v. United Ins. Co.*, 3 Johns. Ca. 224, where the insurance was on cargo, the insured, after loss, exhibited to the insurers the protest of the master, stating the loss and the bill of lading and invoice of the goods. The two latter were not sworn to; wherefore the

It is quite obvious that what proof is necessary under this stipulation may depend upon the circumstances of the case. In one instance it was held sufficient, where the managing owner, in whose name the ship was insured, produced the register of the ship, and made his own affidavit that the ship had sailed twenty months before, from a distant port, and had not been heard from for fifteen months.¹ So where the master was a prisoner and could not make a protest, it was not held necessary.² Upon the whole it would be difficult to give a better definition of the proof requisite under this clause, which is always called preliminary proof, than to say that it must be all which the insured then possesses, and that it must be sufficient to give to the insurers such information, as would enable them, in the words of Chief Justice Thompson, already quoted, "to form some estimate of their rights and duties before they are obliged to pay."

The requirement of this preliminary proof may be waived or qualified by the insurers;³ and this may be done expressly, or by

defendants refused to admit the invoice. But the plaintiff refused to swear to it, as not requisite on his part. The court held that the preliminary proof was enough without the oath. See *Pacific Ins. Co. v. Catlett*, 4 Wend. 83.

¹ *Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26.

² *Munson v. N. E. Mar. Ins. Co.*, 4 Mass. 88. See *ante*, p. 474, n. 1. And where a voyage had been broken up through fear of capture, and the insured had abandoned before the ship had arrived at her home port, it was held that the protest of the master as preliminary proof of loss was not essential, because the owners were not in possession of it. *Craig v. United Ins. Co.*, 6 Johns. 226. In *Barker v. Phoenix Ins. Co.*, 8 Johns. 307, where the loss was payable thirty days after proof, &c., the insured abandoned, October 5th, and produced certain preliminary proofs, which the insurers claimed were insufficient. But on the 21st October the insured fur-

nished more ample proofs, which, taken with those already furnished, were unquestionably sufficient. The action was not brought till thirty days after the latter date. The court said, per *Kent*, C. J.: The communications "might well be considered as an entire transaction, begun on the 5th, and consummated on the 21st of October; and admitting the proof to have been at first insufficient, . . . it was fully supplied on the 21st, and gave the plaintiff his right of action at the expiration of the thirty days."

³ *Allegre v. Maryland Ins. Co.*, 6 Harris & J. 408; *Vos v. Robinson*, 9 Johns. 192; *Francis v. Ocean Ins. Co.*, 6 Cow. 404; *Ocean Ins. Co. v. Francis*, 2 Wend. 64; *McIntyre v. Bowne*, 1 Johns. 229; *Martin v. Fishing Ins. Co.*, 20 Pick. 389; *Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26; *Coursin v. Pa. Ins. Co.*, 46 Pa. St. 323; *Savage v. Corn Exch. Ins. Co.*, 4 Bosw. 1; *Fox v. Conway F. Ins. Co.*, 53 Me. 107.

any conduct which justified the insured in believing that the proof he offered was deemed sufficient.¹ It has been held also that this clause was satisfied, although the notice or information was not given by the insured himself, provided the insurers had received it otherwise.²

The notice with proof may be sufficient for one purpose and not for another, as where sixty days were required and notice was given of a total loss; and subsequently a notice was given of a general-average loss, and an action was brought more than sixty days after the first notice, but less than sixty days after the second notice, it was held that the action was brought too soon for the average claim.³

The policy may contain other analogous clauses. One, frequently called the rotten clause, which provides that the insurers are not bound if the vessel be declared unseaworthy by reason of her being unsound or rotten, *upon a regular survey*. In a case on a policy containing this clause, in the preliminary proof *nothing was wanting but the survey*, and the absence of this proof was held to be fatal.⁴ In this case, however, the court go somewhat on the ground that the survey was, in its own nature, the proper proof of

¹ See the cases in preceding note. In all cases of implied waiver, the question arises, Who is to determine whether the acts of the assurer amount to a waiver? Sometimes, as in *Allegre v. Maryland Ins. Co.*, 6 Harris & J. 408, this seems to have been regarded as the province of the court, and again as the province of the jury. But in *Martin v. Fishing Ins. Co.*, 20 Pick. 389; *Drake v. Farmers' Union Ins. Co.*, 3 Grant, 325; and *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350, it was distinctly held that, whether certain facts amounted to a waiver of preliminary proofs or notice of loss, was a question for the jury alone. So in *Coursin v. Pa. Ins. Co.*, 46 Pa. St. 323.

² *Abel v. Potts*, 3 Esp. 242. In this case the insurer pleaded no notice, and the evidence was that the loss of the ship was publicly known; that she stood on

Lloyd's books as captured; that the insurer was a subscriber to Lloyd's, and in the habit of examining the books there daily. Moreover, the broker who effected the insurance swore that he believed the insurer had notice. On this evidence the jury found for the insured. So it is no matter if all the owners do not unite in presenting the preliminary proofs, or if changes in their respective interests are not stated in the proofs presented. *Walsh v. Washington M. Ins. Co.*, 32 N. Y. 427.

³ *Bryant v. Commonwealth Ins. Co.*, 6 Pick. 131.

⁴ *Haff v. Mar. Ins. Co.*, 4 Johns. 132. As to the time of making the survey, the wording of it, and the manner of pleading it, see *Griswold v. Nat. Ins. Co.*, 3 Cow. 96; and *Rogers v. Niagara Ins. Co.*, 2 Hall, 86; *Brandegge v. Nat. Ins. Co.*, 20 Johns. 328.

such a fact, and still more on the ground that the circumstances of the case warranted the court in assuming that a regular survey of the vessel had been made. We cannot but think that in such a case, if there were no survey, and the insured could show good reason why the survey had not been made, or why, if made, it was not produced, the preliminary proof might be sufficient without it.

It must be understood that, in this matter of preliminary proof, the essential requisite is entire good faith on the part of the insured.¹ If the insurers, on the presentment of any preliminary proof, positively refuse to pay the loss, without grounding their refusal in any way on any objection to the proof, it seems to be quite clear that this is a waiver of their right to have full preliminary proof.² And it has been held that where the insurers, upon

¹ See remark of *Dorsey, J.*, in *Allegre v. Maryland Ins. Co.*, 6 Harris & J. 408 - 412; *Peacock v. N. Y. L. Ins. Co.*, 1 Bosw. 338, 20 N. Y. 293.

² In *Francis v. Ocean Ins. Co.*, 6 Cow. 404, when the preliminary proofs were presented, the insurers answered that "they would not settle the claim in any way." The court say: "The defendants waived whatever imperfections there may have been in the preliminary proofs, &c., by not putting their refusal to pay upon that ground." This case went up to the Court of Errors, where the ruling was sustained. *Ocean Ins. Co. v. Francis*, 2 Wend. 64. In *Vos v. Robinson*, 9 Johns. 192, when the preliminary proofs, which did not include the ship's register, were sworn to the underwriters, they made no objection to the sufficiency of the preliminary proofs, but refused to pay, on the ground of a deviation. The court say: "As the underwriter made no objection to the deficiency of the preliminary proof, and placed his refusal to pay solely on the ground of deviation, he must be deemed to have admitted the plaintiff's interest in the vessel,

or to have waived the necessity of producing the proof of it." In *Peacock v. N. Y. L. Ins. Co.*, 1 Bosw. 338, affirmed 20 N. Y. 293, the court state the reason of presuming a waiver, under the circumstances mentioned in the text, as follows: "When what are presented to them [the insurers] in good faith as preliminary proofs are in any respect defective, common fairness requires that such defect be suggested; and that it be not held in reserve, to be used afterwards to obtain a further delay of payment, or to defeat a suit brought for the money." In *Allegre v. Maryland Ins. Co.*, 6 Harris & J. 408, the president of the insurance company wrote a letter to the insured, after he had made his demand for payment and presented his preliminary proofs, stating that "the company decline the payment, under the persuasion that they are not liable for the same." This was held to be a waiver of all objection to the preliminary proofs.

In *Ratteborn v. City F. Ins. Co.*, 81 Conn. 193, the general agent of the company, acting within the scope of his agency in relation to the particular loss

the preliminary proof, admit themselves liable for a partial loss, and pay the money into court, this is a sufficient admission of the sufficiency of the proof.¹ Where, however, the president of an insurance company, on being asked what further proof was required, answered, "The policy will show," this was held to be no waiver of proof.²

If the provision of the policy makes the insurers liable to pay, in a certain time, after a certain act of their own, and they refuse to perform this act, the right to bring an action is complete without it.³ But if any such stipulation gives a certain time to the

in question, stated to an agent of the plaintiff, who had prepared the preliminary proofs, that it was only the quantity and value of the property that the company disputed. This statement was held to be admissible in evidence, as going to prove a waiver by the company of all objection to the preliminary proofs on account of defects in them.

In *Baltimore F. Ins. Co. v. Loney*, 20 Md. 20, the policy provided that loss should be paid within sixty days after proof, &c. The insured presented their proofs, and made demand for payment; whereupon the insurance company admitted the loss, and offered payment of what they considered to be due, which was, however, too little. The insured claimed that interest should be allowed on the money due them from the date of the demand. The court held, that the condition as to the time of payment was waived, and that the sum for which the insurers were bound became due and recoverable with interest from date of the demand. See also *Rogers v. Traders' Ins. Co.*, 6 Paige, 583; *Martin v. Fishing Ins. Co.*, 20 Pick. 389; *McIntyre v. Bowne*, 1 Johns. 229; *Child v. Sun Mut. Ins. Co.*, 3 Sandf. 26; *Actua F. Ins. Co. v. Tyler*, 16 Wend. 385; *O'Niel v. Bufalo F. Ins. Co.*, 3 Comst. 122; *Tayloe v. Merch. F. Ins. Co.*, 9 How. 398; *Kimball v. Hamilton F. Ins. Co.*, 8 Bosw.

495; *Heath v. Franklin Ins. Co.*, 1 Cush. 257; *Clark v. N. E. Mut. F. Ins. Co.*, 6 Cush. 342. So where the agent of the insurer objected to the preliminary proofs, but refused to return the documents that they might be corrected, this was held to be a waiver. *Turley v. N. A. F. Ins. Co.*, 25 Wend. 374.

¹ *Johnson v. Columbian Ins. Co.*, 7 Johns. 315.

² *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1.

³ In *Strong v. Harvey*, 3 Bing. 304, the plaintiff and defendant were members of an association of ship-owners, who had entered into a mutual engagement for the insurance of each other's ships. The plaintiff's ship was wrecked, and got off with the aid of another vessel. The Admiralty Court at Savannah awarded salvage to the amount of half the value of the cargo. There was reason to suspect fraud on the part of the plaintiff, who was on board of his vessel; and the members of the association refused to adjust the loss, because the plaintiff would not explain the transaction satisfactorily. The rules of the association required that any loss should be paid for in two months after adjustment. And upon the refusal to adjust, the plaintiff commenced actions for some £1,500, whereupon the members of the association tendered to the plain-

insurers to perform this act, and they refuse to perform it, the question whether the insured has a right of action immediately upon the refusal, or must wait until the time expires within which the insurers may perform it, thus giving them a *locus penitentiae*, is a difficult and different question. We do not know that this question has arisen directly under policies of insurance. Under the general law of contracts it has arisen not unfrequently, and the tendency of the decisions is to give to the other party the right of immediate action.¹ But we should have some doubts of this, under a marine policy, unless the capacity of the insurers could not be restored before the day. In a case in Maryland it is held that

tiff £400, "in full of plaintiff's demand." The defendant insisted that the plaintiff could not recover, because no adjustment had been made. But the court held that, in order to make this objection sound, the defendant must show fraud on the part of the plaintiff. If the whole claim were fraudulent, say the court, "it would be an answer to the action; but the jury have found that there was nothing fraudulent in the plaintiff's conduct until after the ship was carried into Savannah, and the plaintiff had a claim for general and particular average before the ship arrived at Savannah. This part of the claim the defendant ought to have adjusted, and paid two months after adjustment." The court ruled that the tender was conditional and bad, even if it were enough to cover the sum actually due to the plaintiff, and that the action was properly brought.

In *Nevins v. Rockingham F. Ins. Co.*, 25 N. H. 22, the act incorporating the company required the directors to settle and pay all losses within three months after notice. Due notice was given; but no settlement or payment was made up to the time when the action was brought, some five months after the notice. The defendants objected that

the action could not be maintained, because it was begun before the directors determined the amount of the loss. But the court said that the directors were bound to decide, at the latest, within three months after notice. "If the plaintiff cannot maintain his action without a previous determination of the loss by the directors, it is not easy to see how an action to recover a loss can in any case be maintained, if the company and directors neglect the duty imposed on them by the charter. They (the defendants) say that the plaintiff should have applied to the equitable jurisdiction of this court, and thus compelled the directors to act. If this is the true construction of the charter, it leaves the assured to an unusual, dilatory, and very inconvenient remedy, in case the directors should neglect their duty, as they have here; for suppose this court should assume the power to compel the directors to act on the loss, unless they should choose to admit and pay it, the insured would still be left to all the additional delays and difficulties of a contested suit on the policy."

¹ For the cases on this point, see 2 *Parsons on Contracts*, pp. 666 and 667, notes a, b, c (5th ed.).

this stipulation as to preliminary proof looks only to the case of an amicable adjustment by the parties, and that, when this cannot be made, the stipulation loses all force, and the right of action immediately accrues.¹

Fire policies sometimes contain a clause requiring that the action shall be brought within a certain definite period after the occurrence of the loss. This clause has been repeatedly held to be valid;² and in one case it was so held, although the company was a stock company doing business in a State other than that where the action was brought.³ And in another case, where the action was commenced within the specified time, and the plaintiff became nonsuit because of a defect in his proof without his fault, and an action was then brought after the expiration of the time, the court held that it was too late.⁴ In two cases, however, this clause was held to be wholly inoperative.⁵ Where the provision was that the suit should be brought in the county where the insurer had his

¹ *Allegre v. Md. Ins. Co.*, 6 Harris & J. 408.

² In *Cray v. Hartford Ins. Co.*, 1 Blatchford, C. C. 280, the policy provided that, unless suit was brought within twelve months after loss, the claim should be barred. *Nelson, J.*, said: "The condition simply requires vigilance in the pursuit of the remedy, beyond the requirement of the law." And he held the condition valid. This case was cited and approved by *Redfield, C. J.*, in *Wilson v. Ætna Ins. Co.*, 27 Vt. 99. See also *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray, 596; *Ketchum v. Protection Ins. Co.*, 1 Allen, 136; *Carter v. Humboldt F. Ins. Co.*, 12 Iowa, 287; *Woodbury Savings Bank v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 517; *Portage Co. Mut. F. Ins. Co. v. West*, 6 Ohio St. 599. In this case the clause was in the act of incorporation. See opinion of *Perkins, J.*, though contrary to that of the majority of the court, in *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Brown v. Roger Williams*

Ins. Co., 5 R. I. 394; *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301; *Northwestern Ins. Co. v. Phoenix Oil Co.*, 31 Pa. St. 448; *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Brown v. Savannah Mut. Ins. Co.*, 24 Ga. 97; *Peoria M. & F. Ins. Co., v. Whitehill*, 25 Ill. 466.

³ *Fulham v. N. Y. Union Ins. Co.*, 7 Gray, 61.

⁴ *Wilson v. Ætna Ins. Co.*, 27 Vt. 99.

⁵ *French v. Lafayette Ins. Co.*, 5 McLean, 461; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443. In the latter case, however, the court were not unanimous. The question is one of much difficulty; at least it is one on which much may be urged on both sides. Courts differ, and judges of the same courts differ; but we think that the weight of authority is decidedly in favor of the validity of the clause requiring actions to be brought within a certain time after loss; and the authority of Judge *McLean* is virtually unsupported.

place of business, this has been held to have no force,¹ the distinction being taken that the time of payment is within the control of the parties, and may be regulated by their agreement, whereas the law itself determines before what tribunal the action may be brought, and the parties have no control of the subject. But when a similar question has arisen as to other contracts, it has been held that an agreement not to sue within a certain time, even under seal, is no bar to the action nor a release of action, but that the defendant must rest upon his action for a breach.² There seems to be no very good reason why, if this principle be just in relation to other contracts, it is not applicable to policies of insurance.

In the case in which it was held that this clause as to time in a policy of insurance was inoperative,³ the decision was put upon the ground that the agreement affected the remedy and not the contract, and was in conflict with the statute of limitations which prescribed the proper time in which a suit might be brought; and upon the further ground, that it was an attempt to discharge or bar a right of action before the right accrued, and was therefore contrary to the principle that a release can only operate upon an existing claim. We doubt the force of those reasons; and if applicable to these questions under a fire policy, they would be equally applicable if they arose under a marine policy. It may be added as quite certain, that, if the insurers by their acts prevent the insured from bringing a suit within the time specified, this will amount to a waiver of the clause.⁴

¹ *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174; *Hall v. People's Mut. F. Ins. Co.*, 1b. 185. But as in Massachusetts all acts of incorporation are made public acts, Gen. St. tit. 1, ch. 3, § 5, the legislature, by providing in an act of incorporation that all actions in certain cases shall be brought in a particular county, thereby repeals to this extent all other public acts which are inconsistent therewith, and an action can be brought in the cases specified only in the particular county. *Boynton v. Middlesex Mut. F. Ins. Co.*, 4 Met. 212. See also *Portage Co. Mut. Ins. Co. v. Stucky*, 18 Ohio, 455. But

such an act is to be construed strictly; and if the precise case pointed out does not occur, the insured may bring his action in any county. *Boynton v. Middlesex Mut. F. Ins. Co.*, 4 Met. 212.

² *Lowe v. Blair*, 6 Blackf. 282; *Bury v. Bates*, 2 Blackf. 118; *Cuyler v. Cuyler*, 2 Johns. 186; *Harrison v. Close*, 1b. 448.

³ *French v. Lafayette Ins. Co.*, 5 McLean, 461.

⁴ *Ames v. N. Y. Union Ins. Co.*, 4 Kern. 253. The policy in this case contained two clauses, — one that the loss was to be paid within ninety days after proof of loss, and the other that action

Our marine policies very commonly contain a clause by which the parties agree to submit any claim which may arise under the policy to arbitration. But it would seem to have been settled by a long course of uniform decisions, both in England and in this country, that the parties to a contract cannot oust the courts of their jurisdiction by any agreement that claims arising under it shall be submitted to arbitration.¹ In an English case such a clause was held to have no effect whatever, although the matters in controversy had been referred to arbitrators, and were still pending at the time of action brought.² So courts of equity have

should be brought within six months after loss. The loss took place July 5th. The proofs were furnished July 14th. A defect in them was pointed out October 7th, and supplied October 14th. The application for payment was made January 2d, when the secretary of the company said that the money would not be due till the 14th, when it should be paid. Finally the company refused to pay. The plaintiff brought an action on the 18th, and recovered. The court say: "The acts and promise of the officers of the company were directly calculated to lull the plaintiff into inactivity, and to assure him that if he would forbear suing until the 14th January, his money should be promptly forthcoming. He was told in effect that the defendants would insist on the condition as to the time when the loss was due and payable; and that, if he commenced an action to save the bar [six months], they should interpose the defence that, by the contract, the insurance money was not yet due and payable. It cannot be doubted, under the proof in the case, that the defendants intended to and did waive the limitation" of the time within which the action should be brought. See *Grant v. Lexington F. L. & M. Ins. Co.*, 5 Ind. 23. In *Peoria Mar. & F. Ins. Co. v. Hall*, 12 Mich. 202, there was a condi-

tion that no action should be brought, unless within twelve months after the loss; and during that time it happened that, owing to the absence of the company's agent, no process could be served. Wherefore, as the plaintiff had issued a summons within the time, and another on the return of the first, after the time had expired, the court held that the action was maintainable.

¹ *Kill v. Hollister*, 1 Wilson, 129; *Thompson v. Charrock*, 8 T. R. 139; *Goldstone v. Osborn*, 2 C. & P. 550; *Mitchell v. Harris*, 2 Ves. 129; *Wellington v. Mackintosh*, 2 Atk. 569; *Nichols v. Chalie*, 14 Ves. 265; *Robinson v. Georges Ins. Co.*, 17 Me. 131; *Hill v. More*, 40 Me. 515; *Allegre v. Md. Ins. Co.*, 6 Harris & J. 408; *Gray v. Wilson*, 4 Watts, 39; *Contee v. Dawson*, 2 Bland, 264; *Randel v. Chesapeake & Del. Canal Co.*, 1 Harring. Del. 233; *Horton v. Stanley*, 1 Miles, 418; *Stone v. Dennis*, 3 Porter, 231; *Haggart v. Morgan*, 4 Sandf. 198, 1 Seld. 422; *Roper v. Lendon*, 1 Ellis & E. 825; *Dyer v. Piscataqua F. & M. Ins. Co.*, 53 Me. 118.

² *Harris v. Reynolds*, 7 Q. B. 71. Though in *Kill v. Hollister*, 1 Wils. 129 (1746), the court seemed to think that if a reference had been made, or an award given, the action *might* have been barred.

also refused to decree specific performance of an agreement to refer to arbitration, or to compel a party to appoint an arbitrator under such an agreement,¹ or to order the arbitrators to proceed where a case was referred to arbitration by consent.²

This would seem to be as well established as a rule could be by decision. But quite recently it has been certainly weakened, if not overthrown, by the courts,³ and it is now provided in England

¹ In *Tobey v. County of Bristol*, 3 Story, 800, Mr. J. Story, says: "It is an established principle of courts of equity never to enforce the specific performance of any agreement, where it would be a vain and imperfect act, or where a specific performance is, from the very nature and character of the agreement, impracticable or inequitable to be enforced. . . . The very impracticability of compelling the parties to name arbitrators, or, upon their default, for the court to appoint them, constitutes a complete bar to any attempt on the part of a court of equity to compel the specific performance of any agreement to refer to arbitration. It is essentially an agreement which must rest in the good faith and honor of the parties, and . . . must be left to the conscience of the parties, or to such remedy in damages for the breach thereof as the law has provided." See *Wellington v. Mackintosh*, 2 Atk. 569; *Street v. Rigby*, 6 Ves. 815; *Milnes v. Gery*, 14 Ib. 400; *Blundell v. Brett*, 17 Ib. 232; *Gourlay v. Duke of Somerset*, 19 Ib. 429; *Wilks v. Davis*, 3 Meriv. 507; *Agae v. Macklew*, 2 Sim. & S. 418; *Mexborough v. Bower*, 7 Beav. 127; *Copper v. Wells*, Saxton, 10. In *Tattersall v. Groote*, 2 B. & P. 131, the court seemed to think that no action at law could be maintained for refusing to nominate an arbitrator in pursuance of a covenant. And in *Cobb v. N. E. Mut. Mar. Ins. Co.*, 6 Gray, 192, where there was an agree-

ment to submit to arbitration, &c., and the insurers, though refusing to accept an abandonment, repaired the ship, this proceeding was held to be a waiver of the submission to arbitration.

² *Crawshaw v. Collins*, 1 Swanst. 40.

³ The first innovation upon the rule was in 1778, in the case of *Halford v. Jennings*, 2 Dickens, 702, *nom. Halfhide v. Fenning*, 2 Bro. Ch. 336. In this case a bill was filed by one partner against another, &c., for an account, and for a production and a discovery. The defendants pleaded that there was a clause in the articles that no bill or suit should be brought respecting the partnership until the matter should have been referred to arbitration, and the arbitrator should have made his award; and the plea was sustained. This decision has generally been thought wrong; but it is sustained by Lord Ch. *Sugden*, in *Dimsdale v. Robertson*, 2 Jones & La Touche, 58. In this case a submission had been entered into by the parties, the arbitrators were designated, and their powers and duties fully pointed out. But before they had done anything, the plaintiff filed his bill alleging that the arbitrators could not do him justice under the powers conferred upon them. It is provided in England and Ireland by statute, that after the arbitrators are appointed, in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of court, &c., the sub-

by statute, that whenever there is an agreement in any written instrument to refer a cause to arbitration, and a suit is brought,

mission cannot be revoked by either party without leave of court. The chancellor held, that the bill could not lie in this case; and the whole subject of the power of a court of equity in the premises was considered at length, and the case of *Halfhide v. Fenning* was considered as correctly decided.

In 1853, came *Scott v. Avery*, 8 Ex. 487, 20 Eng. L. & Eq. 327, in which case there was a rule of the insurance association, that "no member should be entitled to maintain any action, &c., until the matters in dispute should have been referred to, and decided by, arbitrators, and then only for such sum as the arbitrators should award; and that the obtaining the decision of such arbitrators should be a condition precedent to the right of any member to maintain any such action." The Court of Exchequer gave judgment for the plaintiff. The case was then taken to the Exchequer Chamber (*Avery v. Scott*, 8 Exch. 497, 20 Eng. L. & Eq. 334), where the preceding judgment was reversed, on the ground that the provisions mentioned did not oust the courts of their jurisdiction, but merely provided that the amount due should be decided in a particular way, before the party was at liberty to sue; and that this was in the nature of a condition precedent. After this, the case was taken, on error, to the House of Lords (*Scott v. Avery*, 5 H. L. Ca. 811, 36 Eng. L. & Eq. 1), where the decision of the Exchequer Chamber was finally affirmed; and, the opinions of the judges being taken, only three were opposed. Lord Chancellor *Cranworth*, in giving judgment, said, that the language used by the parties indicated that their intention was, that

the amount to be paid should be ascertained in a particular way; and, until that way was adopted, no right of action should exist." In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say. . . . If, in consideration of a sum of money paid to me by A. B., I agree with him, that, in case J. S. should decide that A. B. had fulfilled certain conditions, and had sustained certain damage, and J. S. should make his award accordingly, I would pay to A. B. the sum so ascertained and awarded, no right of action could exist until J. S. had made his award." And Lord *Campbell* follows, thus: "There is an express undertaking, and then abundant consideration; therefore, unless there is some illegality in the contract, the courts are bound to give it effect. There is no statute against such a contract; then on what ground is it declared illegal? It is contended, that it is contrary to public policy; but what pretence can there be for saying that there is anything contrary to public policy in allowing parties to contract that they shall not be liable to any action, until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree? . . . It seems to me that it would be a most expedient encroachment upon the liberty of the subject, if he were not allowed to enter into such a contract. . . . Is there anything contrary to public policy in saying, that the company shall not be harassed by actions, the cost of which might be ruinous, but that any dispute that arises

the court may grant a rule to stay proceedings at the request shall be referred to a domestic tribunal, which may speedily and economically determine the dispute? [The doctrine that the courts could not be ousted out of their jurisdiction] probably originated in the contests of the different courts, in ancient times, for extent of jurisdiction. Where an action is indispensable, you cannot oust the court of its jurisdiction over the subject, because justice cannot be done without the exercise of that jurisdiction. . . . All that has hitherto been decided . . . is this: that, if the contract . . . simply contains a clause or covenant to refer to arbitration, and goes no further, then an action may be brought, in spite of that clause, although there has been no arbitration. But there is no case that goes the length of saying, that, where the contract is as it is here, that no right of action shall accrue until there has been an arbitration; then an action may be brought, although there has been no arbitration. Now, in this contract of insurance, it is stipulated, in the most express terms, that, until the arbitrators have determined, no action shall lie in any court whatsoever. This is not ousting the courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues, until the arbitrators have determined." In this same case, *Creswell, J.*, said: "The whole of the doctrine as to ousting the jurisdiction of the courts appears to have been based upon Co. Litt. 536: 'If a man makes a lease for life, and by deed grants that, if any waste or destruction be done, it shall be redressed by neighbors, and not by a suit or plea, notwithstanding, an action of waste shall lie, for the place wasted cannot be recovered without plea.' The case is not to be found in the Year Book referred to, but is in Fitz. Ab. *Waste*, fol. 5; and the whole of it is given in Co. Litt. 536. It seems, that this decision proceeded on the ground that the neighbors could not redress the wrong done; that it could only be done by plea; therefore, notwithstanding, an action of waste would lie. There is not a word leading to the supposition that an action would have been maintainable if the neighbors could have given the appropriate redress; or that it might not have been granted by deed, that, if a dispute arose about waste, neighbors should say whether there had been waste or not." In *Russell v. Pellegrini*, 6 Ellis & B. 1020, 38 Eng. L. & Eq. 99 (1856), Lord Campbell, C. J., said: "For some time the courts had a great horror of arbitrations, and doubts were entertained, whether a clause for referring matters in dispute, introduced in an agreement, was not illegal. But I cannot imagine why parties should not be allowed to settle their differences in the manner which they think most convenient. When a cause of action has arisen, the courts are not to be ousted of their jurisdiction; but parties may come to an agreement that there shall be no cause of action, until these differences have been referred to arbitration."

In *Tredwen v. Holman*, 1 Hurlst. & Col. 72 (1862), the policy contained a clause to the effect that all disputes should be referred, and that the decision of the arbitrators should be final; and no action should be brought till the decision had been given. The plaintiff brought an action for total loss, before the claim had been adjusted and settled by arbitration. The court say, per *Martin, B.*: "The case of *Scott v. Avery*, 5 H. L. Ca. 811, decided that the insurer and the

of the defendants.¹ Mr. Phillips, in his third edition, says of this agreement only: "I am not aware of any reported decree or judgment enforcing this stipulation."² And in his fifth edition: "The validity and effect of this provision have been subjects of doubt." It might be quite enough to say this and no more, were it not for the probability, at least the possibility, that the courts of this country might be influenced either by regarding the late English statute as declaratory of the common law, or by the reasons

underwriter may contract that no right of action (to be enforced in a court of law) shall accrue until an arbitrator has decided, not merely as to the amount of damages to be recovered, but upon any dispute that may arise upon the policy. The question, therefore, is one of construction, and we think the parties to this policy have so agreed. . . . The agreement is clear and unambiguous, and the parties probably want to act upon *Scott v. Avery*, and exclude the jurisdiction of the courts of law, except for the purpose of enforcing the award to be made by the arbitrators. The plaintiff is therefore in the wrong. The defendant proposed to him to refer the matter in dispute, to which he refused to accede, and he has failed to perform that which is a condition precedent to his maintaining the present action."

In *Livingston v. Ralli*, 5 Ellis & B. 132, 30 Eng. L. & Eq. 279, there was a contract containing a provision that, if any difference arose, it should be referred. The declaration averred that a difference arose, and that the defendant refused to refer. The plea set forth the contract, and averred a difference, which the defendant claimed was frivolous; but on demurrer the court held that the action lay.

¹ 17 & 18 Vict. ch. 125, § 11. "Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them, shall agree

that any then existing or future differences between them, or any of them, shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall, nevertheless, commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming through or under him or them, in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which such action or suit is brought, or a judge thereof, on application by the defendants, or any of them, after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration, according to such agreement as aforesaid, and that the defendant was, at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise as to such court or judge may seem fit: provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require."

² 2 Phil. on Ins. 1941.

on which the English courts have rested their recent decisions, to make a similar change in our adjudication on the subject of arbitration.¹ An agreement in a policy executed by a foreign insurance company, that the insured shall bring no action save in the courts of the State which incorporated the company, has been held to be void, not only as contrary to a statute of the State where the insured lived, but on grounds of public policy.²

SECTION IV.—*Of Rights of Action acquired by Insurers.*

THE insurers may pay a loss, under a mistake of a material fact, and because they were led by that mistake into the belief that they were liable when they were not so in fact. The common rules of law would perhaps apply in this case. If the mistake were their own fault, that is, if they had sufficient means of information and neglected to make use of them, they could not profit by this negligence.³ But in a later English case it is held, that the insurers are not barred from recovering money paid under a mistake, even by their own laches, or by their not choosing to make inquiries which it was in their power to make.⁴ If after such pay-

¹ In *Cobb v. N. E. Mut. M. Ins. Co.*, 6 Gray, 192, the court, after stating that the invalidity of a reference condition seemed to have been settled, say: "The recent cases, however, of *Scott v. Avery*, *Livingston v. Ralli*, and *Russell v. Pellegrini*, may possibly lead to some revision and qualification of the doctrine as heretofore understood."

² *Reichard v. Manhattan L. Ins. Co.*, 31 Mo. 518.

³ This was settled in England in *Bilbie v. Lumley*, 2 East, 469. Bilbie was an underwriter who had paid a loss to the defendants, and now sought to recover the money on the ground that, at the time when the insurance was effected, a certain material letter had not been shown to him. The defendants admitted that the letter was not material, but alleged that it had been submitted to the underwriter before the

loss was adjusted; and that the loss, therefore, had been paid under a full knowledge of the facts. A verdict was at the trial found for the plaintiff, which was by the whole court on exceptions set aside. In *Elting v. Scott*, 2 Johns. 157, *Kent*, C. J., waived the question, but seemed to approve the doctrine of the above case.

⁴ *Townsend v. Crowdy*, 8 C. B. N. S. 477. In this case the party seeking to recover the money paid had free access to certain documents which would have informed him how much he was bound to pay, but did not examine them. *Williams, J.*, said: "No doubt at one time the rule, that money paid under a mistake of fact might be recovered back, was subject to the limitation that it must be shown that the party seeking to recover it back had been guilty of no laches. But

ment they discover a fact which would have barred or defeated an action of the insured, they may now bring assumpsit for what they paid, as for money had and received for their use, or any other appropriate action.¹

This has been held where the policy has been forfeited by a breach of warranty.² And also in a case where an insurance was made by a mortgagor, and a loss paid to him, and the insurers discovered after the payment that the policy was made only to cover the mortgagee's interest.³ The general principle of law would also be applied, which limits this right of action of discovery of mistake to a mistake of fact, the rule being that all persons are held responsible for their own knowledge of the law; or, in a phrase

since the case of *Kelly v. Solari*, 9 M. & W. 54, it has been established that it is not enough that the party had the means of learning the truth, if he had chosen to make inquiry. The only limitation now is, that he must not waive all inquiry."

¹ In *Cox v. Prentice*, 3 Man. & S. 344, the defendant, an agent, had received some silver from his principal abroad, and had carried it to the plaintiffs, who, having had it assayed, bought it, paying for as many ounces of silver as the assayer declared it to contain. It was afterwards discovered that there had been a mistake in the assay, in consequence of which the plaintiff had paid too much, and he thereupon demanded a return of the money, offering to return the silver. This the defendant refused to do, on the ground that he had forwarded his account to his principal, and in it had placed the price received to the credit of his principal. Held, that the plaintiff could recover. This principle was applied to insurance cases by *Columbus Ins. Co. v. Walsh*, 18 Mo. 229. The company issued a policy to the defendant, insuring his interest in a steamboat in the sum of \$6,000; and there was a clause in the policy which

avoided the contract in case any other insurance should be obtained on the same interest. A loss occurred, and was paid for by the insurers. Afterwards it came to the knowledge of the insurers that another insurance had been obtained after the issuing of their own policy, which covered the same interest. They brought this action to recover the amount which they had paid. The court said: "There is no doubt at this day that money, which has been paid under a mistake of facts which, had they been known, would have been a defence to bar the recovery, may be recovered back. Here there was an act on the part of the assured directly against the policy stipulation, which would have discharged the office from all liability to the assured arising under the policy, had it been known at the time of the adjustment of the loss. . . . Therefore, money paid on a loss by an insurance company, in ignorance of the fact that the assured had avoided the policy by subsequent assurance, may be recovered back."

² *De Hahn v. Hartley*, 1 T. R. 343; and see *Elting v. Scott*, 2 Johns. 157.

³ *Irving v. Richardson*, 2 B. & Ad. 193.

commonly used, are presumed to know the law. In one case where material information had been withheld from the insurer before the policy was made, which concealment would have barred an action on the policy, and a letter containing the information was given to the insurer before he paid the loss, and he paid the loss, either from neglecting to read the letter or from mistake as to its legal effect, he was not permitted to recover back the money he paid.¹

We cannot doubt that where an insurer is induced by falsehood and fraudulent deception to pay a loss without an action, he may recover it back.² We should extend this rule to cases where the fraud was previous to the making of the policy, and caused the making of it.³ If, however, the insured resisted the payment, and an action being brought by the insured he recovered judgment thereon, and the insurer satisfied the judgment and afterwards discovered a fraud which would have given him a good defence to

¹ *Bilbie v. Lumley*, 2 East, 469.

² *Lefevre v. Boyle*, 3 B. & Ad. 877; *Buller v. Harrison*, Cow. 565. In this case the insurer, the plaintiff, had paid the loss to an agent of the insured, who had passed it to the credit of the principal, but had not paid it over. Subsequently the insurer, finding that the loss was foul, brought this action and recovered. The judgment of the court is upon the point whether the action would lie against the principal; and the law that relates to the rule in the text is contained in the direction that Lord Mansfield said he should have given to the jury: "If you are satisfied that the money was paid by mistake, and the defendant's situation not altered by any new circumstance since, but that everything remained in the same state as it was on the 20th of April, you ought to find for the plaintiff." In all the cases on this point there seems to be no serious dispute of the insurer's right to recover, which is generally settled at the trial; while the arguments before the

whole court are upon other issues. See cases in the two following notes.

³ In *Court v. Martineau*, 3 Doug. 161, an action was brought by the plaintiff, an underwriter, to recover back the amount of a loss paid by him on a policy of insurance, which, as it was contended, was avoided by concealment. The case was tried twice. At the first trial, *Buller, J.*, thinking the concealment material, directed a verdict for the plaintiff. At the second, Lord Mansfield thinking it not material, a verdict was found for the defendant, which was sustained. The concealment in this case was, of course, at the time of making the policy or before, and was the only matter discussed; for the right of the insurer to recover the money, if the concealment were material, seems to have been admitted on all sides. So when a life policy had been fraudulently effected, and a loss paid, the insurer recovered back the money. *Lefevre v. Boyle*, *Ellis's Ins.* 168.

the action, it would seem that he could not recover back the money he thus paid by a distinct action therefor.¹

The decision in this case rested on abundant authority to the effect that, where a cause has been determined by a tribunal having jurisdiction in an action where all matters of defence were open to the defendant, the judgment is conclusive until reversed by a superior court, which has jurisdiction on the same cause on a writ of error. The court rested their decision also upon the fact that, in Massachusetts, where the case was tried, provision was made by statute for a review of judgments within a time thought reasonable by the legislature, and it might be inferred that a limitation of time was intended to the right of parties to complain of wrong done them by such judgments. We may believe that this rule would be applied wherever the insurers had an adequate remedy in their power of reversing the judgment. But where this could not be done, and no statute of limitation interfered, we should suppose some remedy would be found for such a case at law or in equity.

¹ *Homer v. Fish*, 1 Pick. 435. In this case, *Parker, C. J.*, says: "It certainly is a principle admitted by all courts in the abstract, that a matter of controversy which has been inquired into and settled by a court having jurisdiction of the subject cannot be drawn in question again, in another suit between the same parties, for the purpose of defeating or avoiding the effects of a judgment of the court to which it has been submitted. It is so laid down in express terms by all the judges, in the case of *Philips v. Hunter*, 2 H. Blk. 415. And even in the case of *Moses v. Macferlan*, 2 Burr. 1008, in which it has been supposed by some that the principle was violated, Lord *Mansfield* says: 'It is most clear that the merits of a judgment can never be overhauled by an original suit either at law or in equity. Till the judgment is set aside or reversed, it is conclusive, as to the subject-matter of it, to all intents and purposes.'" He then quotes the authority of Lord *Redesdale*, in *Bateman v. Willoe*, 1 Sch. & Lefr. 204, and Chancellor *Kent*, in *Smith v. Lowry*, 1 Johns. Ch. 322, and continues: "Common-law courts have held the same doctrine as in *Smith v. Lewis*, 3 Johns. 157; *Peck v. Woodbridge* 3 Day, 36; *Marriott v. Hampton*, 7 T. R. 269. The court in Connecticut, in the case reported by Day, say that 'it is a principle of the common law that a man cannot collaterally impeach, or call in question, a judgment of a court of law, or decree in equity, to which he is a party. It can only be done directly by writ of error, petition for a new trial, or bill in chancery.' The same principle has been recognized by this court in the cases, *Homes v. Aery*, 12 Mass. 137; *Thatcher v. Gammon*, 12 Mass. 268; *Rowe v. Smith*, 16 Mass. 308; *Loring v. Mansfield*, 17 Mass. 394."

SECTION V. — *Against whom an Action may be brought.*

WHERE insurers accept an abandonment, they acquire thereby, together with all salvage abandoned to them, all the rights of action of the insured.¹ They hold them however only as assignees, the abandonment being in fact an assignment to them.² And

¹ In *Kennedy v. Baltimore Ins. Co.*, 3 Harris & J. 367, the plaintiff's vessel had been insured by the defendants, and captured. Immediately after the capture the plaintiff abandoned to the insurers. The freight on the cargo had been paid to the insurers, and plaintiff brought this action to recover it. It was held that he could recover that portion of the freight earned up to the time of the capture. The court lay down the law as follows: "The abandonment of the ship for a total loss, on account of the capture, did, by operation of law, transfer all the right and interest of the appellant [plaintiff] in the ship to the appellees [defendants], on their acceptance of the abandonment, and all the benefits and advantages directly or incidentally accruing from the ship subsequent to the capture." And in *Chesapeake Ins. Co. v. Starke*, 6 Cranch, 268, *Marshall, C. J.*, says: "If the abandonment was legal, it put the underwriters completely in place of the assured." See *Mellon v. Bucks*, 5 Mart. La. N. S. 371, quoted *infra*, p. 498, n. 1; *Columbian Ins. Co. v. Ashby*, 4 Pet. 139; *Yates v. Whyte*, 4 Bing. N. C. 272, quoted *infra*, p. 493, n. 1; *Walker v. United Ins. Co.*, 11 Sug. & R. 61, *infra*, p. 497, n. 1; *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285, *infra*, p. 495, n. 1; *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173, *infra*, p. 493, n. 2; *Gould v. Citizens' Ins. Co.*, 13 Mo. 524; *Mut. Safety Ins. Co. v. Cargo, &c.*, Olcott, Adm. 89; *Rogers v. Hosack*, 18 Wend. 319; *Coolidge v. Gloucester, M. Ins. Co.*, 15 Mass. 341.

² See remark of *Dallas, C. J.*, in *Davison v. Case*, 8 Price, Exch. 543, 560. In *Coolidge v. Gloucester M. Ins. Co.* the court say: "After the loss has happened, the insurers, in virtue of the abandonment, become the owners, and are liable for the repairs and expenses, and entitled to the earnings, of the ship. . . . By the abandonment of the ship, the insurers stand in no better situation than the assured in respect to the vessel, but succeed to his rights." In *Schieffelin v. N. Y. Ins. Co.*, 9 Johns. 21, *Kent, C. J.*, says: "An abandonment, when founded upon a statement of facts justifying it, relates back to the time of the loss, and renders the insurer proprietor of the subject from that time, with the rights and risks attached to that relation. 2 Emerig. 196, 235." In *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173, goods were delivered to the defendants, as common carriers, under an agreement that, in consideration of reduced prices for transportation, the shippers should take the risk of loss or damage from the dangers of lake and river navigation, fire, &c.; and that, in case of loss or damage for which the carriers might be liable, they should have the benefit of any insurance by or for account of the shippers. The goods were damaged to the extent of more than half their value, without fault on part of defendants, and abandoned to the insurers, who paid to the shippers the full value of the goods, having no knowledge of the special agreement; and then brought this action against the

wherever the law requires that the assignees must bring their actions in the name of the assignor, the insurer must bring his action in the name of the insured.¹

carriers, claiming to be subrogated to all the rights of the insured. This claim the court admitted, but held that the insured would have had no right of action against the carrier, in consequence of the special agreement. The court say, per *Allen, J.*: "If there had been no special agreement between the insured and the defendants, the plaintiffs would undoubtedly be entitled to recover, if the defendants were liable for the loss of the goods. . . . The abandonment has all the effect of an assignment by the insured, when the assignees would become possessed of all the rights against the carrier which the insured possessed at the time of the assignment, and no more. . . . The contract, therefore, having been lawful and tainted with no fraud, the plaintiffs could only take it from the insured with such rights as they [the insured] had against the carriers." And judgment was given for the defendants. See *Deduer v. Del. Ins. Co.*, 2 Wash. C. C. 61; *Gould v. Citizens' Ins. Co.*, 13 Mo. 524.

¹ In *London Ass. Co. v. Sainsbury*, the property insured having been burned by rioters, the insurers paid the loss, and brought this action against the hundredors in their own names. The court were divided; but the Exchequer Chamber gave judgment unanimously against the right of the plaintiff to maintain the action. Lord *Mansfield* said: "My leaning is strongly in favor of the plaintiffs, if the case will bear me out; for otherwise they must lose a sum of money for want of a remedy. . . . In respect of salvage, the insurer stands in place of the insured, and *vice versa* as to damage. I

take it to be a maxim, that, as against the person sued, the action cannot be transferred. As between the parties themselves, the law has long supported it for the benefit of commerce; but the assignee must sue in the name of the assignor, by which the defence is not varied. . . . The case of a sheriff who has paid the whole debt is very strong, for he stands in the place of the debtor by act of law; yet he must sue in the name of the plaintiff. If the insurer could sue in his own name, no release by the insured would bar, nor would a verdict by him be a bar. It is impossible that the insured should transfer, and yet retain his right of action. Trustee and *cestui que trust* cannot both have a right of action. It is a great hardship for which I cannot find a remedy; but it is better that the general rule of law should prevail, that, as against the person sued, the right of action cannot be transferred, nor the defence raised." On the authority of this case was decided *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253. But in equity the insurer may sue in his own name. *Garrison v. Memphis Ins. Co.*, 19 Mon. 312. So also in admiralty; for in *Mut. Safety Ins. Co. v. Cargo of Brig George, Olcott's Adm.* 89, *Betts, J.*, says: "The abandonment conferred on them [the insurers] every interest and right in the ship possessed by her owners. They take all title and authority of the assured, even the *spes recuperandi*; his agents become theirs, and they stand subrogated to every privilege and power he possessed and might legally exercise. If this complete substitution of the assurers in the place of the assured should fail to confer

As the insurers not only acquire by abandonment all the interests in the subject-matter of the insured, but all his rights of action connected with it; so the insured must concur in whatever measures are necessary to the full benefit and advantage of the interests and rights transferred to him.¹ They may use his name in all actions where it is necessary, and may claim whatever compensation or contribution the insured could claim against other persons.² And as the insurers become owners of the property

also the capacity to sue at law in their own names, they would meet no such technical impediment in this court; an assignee of an interest may maintain an action upon his title as if originally vested in him." See *Mason v. Sainsbury*, 3 Doug. 61.

¹ In *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253, the court say: "Payment to the owner by the insurer does not bar the right against another party originally liable for the loss, but the owner, by recovering payment of the underwriters, becomes trustee for them, and by necessary implication makes an equitable assignment to them of his right to recover in his name." In *Mason v. Sainsbury*, which was an action by the insurers, who were paid a loss, against the hundred, Lord Mansfield said: "The office paid without suit, not in ease of the hundred, and not as co-obligors, but without prejudice. It is, to all intents, as if it had not been paid. The question then comes to this, Can the owner, having insured, sue the hundred? Who is first liable? If the hundred, it makes no difference; if the insurer, then it is a satisfaction, and the hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured." And the plaintiff recovered. So in *Randal v.*

Cockran, 1 Ves. Sen. 98, where certain reprisals had been made, the benefit of which went to the owners of captured vessels, the plaintiff, an insurer who had paid the loss, brought a bill in chancery to recover a part of the value of the prizes. The Lord Chancellor was of opinion "that the plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner, but after satisfaction made to him, the insurer. No doubt but from that time, as to the goods themselves, if restored *in specie*, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid." C. J. *Shaw*, in *Hart v. Western R. R.*, 13 Met. 99, says of *Randal v. Cockran*: "This was a case in chancery; but where the same principle can be carried into effect in the ordinary forms of proceeding in a court of law, the same principle will be applied. If the trust consists in an equitable liability to pay money, it will be recognized and enforced in a suit at law." See also *Yates v. Whyte*, 4 Bing. N. C. 272, where it was held that the defendants, who had damaged the plaintiff's ship by collision, were not entitled to deduct from the damages to be paid by them a sum of money paid to the plaintiff by insurers for that very loss. And see *Hart v. Western R. R.* 13 Met. 99, cited in next note.

² See cases in preceding notes. In *Hart v. Western R. R.*, 13 Met. 99, a

abandoned to them, they have all the actions and remedies of an owner for any torts, as barratry or others, committed after their

building was destroyed by fire from the defendants' engine. Sparks from this building set on fire the dwelling-house of the plaintiff, and it was partially consumed. The action was founded on a statute of Massachusetts, which provides that when any injury is done to a building "by fire communicated" by a locomotive-engine of a railroad corporation, the corporation shall be responsible in damages to the person so injured. "The plaintiffs were insured by the Springfield M. F. I. Co., who requested the plaintiffs to commence a suit against the defendants to compel payment by them of the plaintiffs' loss, and offered to indemnify the plaintiffs from costs, and to save them harmless in reference to said suit. The plaintiffs refused to commence a suit as requested, but demanded the amount of their loss of the said insurance company, who paid the same, first giving notice to the defendants that they did not intend thereby to relinquish any claim which they might have against the defendants for the amount in their own or in the plaintiffs' names. The insurance company, in the name of the plaintiffs, then brought this action to recover the amount paid by said company to the plaintiffs. After the action was commenced, and before the entry of the writ, the plaintiffs executed an instrument declaring that they had received payment of their loss of the insurance company; that they had no claim against the defendants; that they [the plaintiffs] had not authorized the commencement of this action against the defendants, and did not wish to have it prosecuted; and fully releasing any claim which they might have against the defendants on account

of said loss." The first question in the case was whether the railroad corporation was liable to anybody under the statute for the building destroyed. This the court answered in the affirmative; and with reference to the right of the insurance company to maintain this action, they say, per *Shaw*, C. J.: "When the owner, who *prima facie* stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss for which he has a claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company and receives the damages provided, it diminishes his loss *pro tanto*, by a deduction from and growing out of a legal provision attached to and intrinsic in the subject insured. The liability of the railroad company is in legal effect first and principal, and that of the insurer secondary; not in order of time, but in order of ultimate liability. The insured may first apply to whichever of these parties he pleases; to the railroad company by his right at law, or to the insurance company in virtue of his contract. But if he first

ownership began. If the owner has a claim against the master for barratry before the abandonment, or against any other persons for torts, we suppose these claims pass to the insurers by abandonment, and they hold them as assignees.¹ A common instance of

applies to the railroad company, who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of the insurance, to wit, the building insured, and his claim is for the balance. And it follows as a necessary consequence that, if he first applies to the insurer and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. When such an equity exists, the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected." The court then cite *Mason v. Sainsbury*, 3 Doug. 61; *Clark v. Hund. of Blything*, 3 Dowl. & R. 489, 2 B. & C. 254; *Yates v. Whyte*, 4 Bing. N. C. 272, 5 Scott, 640; *Randall v. Cockran*, 1 Ves. La. 98; *Cullen v. Butler*, 5 M. & S. 466; *Gracie v. N. Y. Ins. Co.*, 8 Johns. 245; *Brooks v. McDonnell*, 1 Y. & Coll. Exch. 500; and say in conclusion: "In regard to the right of the insurance company to sue in the name of the insured, we think the cases fully affirm the position that, by accepting payment of the insurers, the assured do implicitly assign their right of indemnity from a party liable to the insurers. It is in the nature of an equitable assignment which authorizes the assignee to sue in the name of the assignor for his own benefit; and this is a right which a court of law will support, and will restrain and prohibit the assignor from defeating it by a release. The formal discharge, therefore, given

by the nominal plaintiffs, is not a bar to the action. See *Payne v. Rogers*, 1 Doug. 407; *Whitehead v. Hughes*, 2 Crompt. & M. 318; *Phillips v. Clagett*, 11 M. & W. 84; *Timan v. Leland*, 6 Hill, 237."

• But the insurers cannot claim any compensation that the insured could not. *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173, quoted *supra*, p. 491, n. 2. So where a railroad company by their negligence caused the death of a passenger, in consequence of which an insurance company had to pay the sum due on a policy on the life of the deceased, it was held that, as at common law no action lay for the destruction of human life, the insurers had no right of action against the railroad company. And this, notwithstanding a statute of the State gave an action for damages to the personal representatives of the deceased. *Conn. Mut. L. Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265.

¹ *Bird v. Thompson*, 1 Esp. 339, was an action to recover on a policy of insurance. The loss was by barratry; and the master of the vessel was produced by the defendant to disprove the barratry. The witness was objected to, as he had no release from the underwriters. Lord *Kenyon* sustained the objection, and said that, "if the plaintiffs obtained a verdict, he conceived that the defendant might maintain an action against him [the master], the loss having arisen from the barratry, which was his act; for though he knew of no action of that sort ever having been brought, yet he conceived that, whenever a man acted contrary to his duty,

this transfer of claim is where the insurers thus become possessed of the rights of the insured to general-average contribution.¹

Shippers can claim compensation from the owners or master of the ship for any losses caused by their fault, or by any negligence of the officers or mariners, whether by bad stowage, by collision, or by unjustified deviation. For these claims the shipper may bring his own action for his own benefit;² but if he transfers the

whereby another received a damage, or was rendered responsible or liable to damages, he might maintain an action *ex delicto* against the person who had so subjected him." But for barratry committed before abandonment, the action, if brought by the insurers, must be in the name of the insured, for there is no privity between the master or mariners and the insurers, until the latter become actual owners in consequence of abandonment. And the insurers could as assignees have no higher rights against the barrators than the insured. This seems in accordance with the doctrine laid down in *Rockingham Ins. Co. v. Bosher*, 39 Me. 253, where it was held that the insurers in their own names cannot have an action against a person who sets fire to a building insured by them. For the court say: "The reason of the doctrine that an action may be maintained in the name of the owner, as the trustee of the insurer who has paid the loss, against the wrong-doer or party first liable as principal, is wholly inconsistent with the principle that the insurer can in his own name recover for money paid on the contract of insurance in an action against the wrong-doer. For the insurer and assured being in effect one person, each cannot maintain an action at the same time and for the same loss, when there can be but one satisfaction." See also *Conn. Mut. L. Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265, to the same

effect; and *Hart v. Western R. R.*, 19 Met. 99, where the insurer, standing in a position analogous to that of a marine underwriter after abandonment, brought his action in the name of the insured, and recovered. See this case quoted fully, *supra*, p. 498, n. 2.

¹ See *Walker v. U. S. Ins. Co.*, where there was a general-average loss, previous to the total loss, for which the plaintiff sued. The court held that the plaintiff could recover as for a total loss, leaving to the defendant [the abandoner] the right to pursue against the cargo, or those who are responsible in respect of it, for contribution," &c.

² *Phillips v. Baillie*, 3 Doug. 374. In this case the defendant advertised a ship to sail with convoy. The plaintiff shipped goods on her, which he insured with a warranty that the ship should sail with convoy. Preliminaries of peace having been gazetted, she sailed with no convoy, and was lost. No notice was given to the plaintiff by the defendant that the ship would sail without convoy. The plaintiff was nonsuited in an action against the insurers, and then brought this action. Lord Mansfield said that "it was the duty of the defendant to give notice to the plaintiffs, so as to enable them to alter their insurance"; and it was held that the plaintiff could recover. See also *Parker v. James*, 4 Campb. 112, where the loss took place in consequence of deviation.

goods to the insurers by abandonment, he will, generally at least, transfer to them all such rights of action.¹ So of the action

¹ In *Mellon v. Bucks*, 5 Mart. La. 371, the plaintiff claimed the value of certain goods shipped by him on board a vessel of the defendant. On the voyage the vessel was condemned as unseaworthy, and the cargo, being of a perishable nature, was sold. Before beginning this action the plaintiff had abandoned and claimed for a total loss, and was at this time pursuing the claim in court. The court say: "On receiving information of the accident which affected the vessel and her cargo, the plaintiff was bound to consider and determine whether, according to occurrences, he would abandon to the insurers, and pursue them as for a total loss, or retain his right to the property insured, and prosecute for a partial damage or injury. He has chosen the former method of pursuit, and by so doing has divested himself of all title to the property claimed in the present suit, and transferred it to the insurance company, at least so far as his will was concerned in the transaction. . . . We therefore conclude that as owner he cannot maintain the present action. See 6 Cranch, 268; 1 Caines, 292." In *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285, the defendant was insured on goods which had been shipped, but were stolen before the ship sailed. Storrow abandoned to the insurers, and then began an action at law on the policy, and recovered. The insurers then expressed their readiness to pay the loss, provided Storrow would put them in possession of the bill of lading, &c., and make suitable covenants that the remedy against the ship-master or owners was not impaired; but that, unless this was done, they would seek relief in chancery. In reply, Storrow stated that the bill of lading had

been delivered to the ship-master to be cancelled. Whereupon the insurers brought this bill in equity; and the vice-chancellor decided that the underwriters were, by the loss and abandonment, entitled to be subrogated to the rights of the assured, if they paid the loss. And he decreed that the complainants be allowed the amount which the master or ship-owners would have been liable for, and that the judgment should only be enforced for the residue, if anything. On appeal, the chancellor (*Walworth*) affirmed the decree, and said, after coming to the conclusion that the insurers were liable for the loss of the goods by theft: "It is insisted, however, on the part of the respondents, that, although they have succeeded in satisfying the superior court that this was a loss for which the underwriters were liable on this policy, it was a case in which the underwriters and ship-owners were equally liable, and that the equities of both were equal as to the assured. Even if this were so, it does not follow that the assured had a right to receive the amount of the loss from either, and assign over to the one from whom it was received the right to claim the full amount from the other party. It would rather present a case of equitable contribution, in which each should contribute a moiety towards the loss, as in the case of a double insurance. The insurers, however, are not liable to contribute for a loss, for which the master or ship-owners are also liable to the assured. The contract of insurance is a new contract of indemnity to the assured against such losses as he may actually sustain by reason of any of the perils assured against. And upon an

of the owners against pilots for damage against their misconduct,¹ or against captors for an unlawful capture.²

It is to be remembered, however, that in all such cases the abandonment alone gives to the insurers no rights of action; for an abandonment is an assignment which cannot take effect as such until both parties consent, that is, until the insurers accept the abandonment. Before that takes place, they have no more standing in court, and no further interest in the rights of the insured, than any other persons who are creditors of the insured, or have received offers from them.³

abandonment and payment, or upon a recovery as for a total loss, the underwriters are entitled to subrogation, at least in equity, to all the rights and remedies which the assured has to the property which is not actually destroyed, including the *spes recuperandi*, from any other source, unless the underwriters have relinquished that right by a stipulation in the policy. . . . If it had appeared upon the trial of the suit at law that the assured had received a compensation for his loss from the ship-owners or the master, and that the assignment was made for their benefit merely, to enable them to recover back the amount of the insurance from the underwriters on the policy, there can be no reasonable doubt that it would have been a good defence at law, at least to the amount thus received."

¹ In *McIntosh v. Slade*, 9 Dowl. & R. 738, where a barge had been sunk by a brig in consequence of the fault of the pilot of the latter, it was held that the owners of the barge could recover for their loss against the pilot.

² *Boehm v. Bell*, 8 T. R. 154; *Appleton v. Crowninshield*, 3 Mass. 443, 8 Mass. 340. These cases establish the right of the owners to recover of the captors for an unlawful capture; and, on the principle of the cases in the foregoing notes, the insurer who had paid a

loss would have an action in the name of the insured against the captors.

³ *The Ship Packet*, 3 Mass. 255. This vessel being injured at sea, the master borrowed money on bottomry to repair her. She finally reached her home port, when she was libelled in admiralty by the bottomry bondholders, and vessel and cargo sold. Among the claimants of the proceeds in the registry was an insurance company, which had underwritten an insurance on the ship, and to whom she had been abandoned; but the abandonment had not been accepted. Mr. J. Story said: "The first point which I am called upon to consider is, whether an underwriter who has refused to accept an abandonment can be permitted to claim property in the ship in this court. In my opinion, it is perfectly clear that he cannot. He has not, and pretends not to have, any *jus ad rem* or *jus in re*. All that can be said is, that he may ultimately have an interest in the questions here litigated. But an interest in the question forms no title to claim property in the admiralty. This court looks only to rights in the thing itself, to ownership general or special, and to such claims as are direct in the proprietary interest, such as a legal title or *jus in re*, or to such as are indirect, as a lien or *jus ad rem*. . . . Underwriters, as

SECTION VI. — *Of an Action by one effecting or ordering Insurance through an Agent.*

If the insured procured his insurance through a broker or other agent, and was injured by his negligence, he has his claim for damages.¹ And an action has been sustained in England by an

such, cannot litigate here as to the rights of the libellants or the claimants. They are mere strangers, and no more entitled to be heard than any contingent debtor or creditor of either party."

¹ In *Park v. Hammond*, 1 Holt, 80, 4 Campb. 344, *Gibbs*, C. J., says: "The law on this point is clear. A broker is bound to have knowledge and diligence, and must execute his orders; but it is not every mistake which makes him responsible." In this case the error of the broker was in not stating correctly the port where the goods insured were loaded; and he was held liable. In *Mallough v. Barber*, 4 Campb. 150, the brokers effected insurance "at and from Teneriffe," without inserting in the policy "a liberty to touch and stay at all or any of the Canary Islands." It was proved to be the invariable custom to insert this clause in Teneriffe policies, even without special instructions; and the brokers were held liable. *Moore v. Mourgue*, Cowp. 479, was an action against a broker who procured insurance on fruit at an office whose policies always contained the exception, "free from particular average." It appeared that certain other offices insured at the same rate, but without this exception. And it was contended that, on general instructions to insure, the broker was guilty of gross negligence in not insuring at the latter offices. But the jury found for the broker, and the court refused to grant a new trial. So when a broker effected insurance, but neg-

lected to get the policies from the insurers, who afterwards refused to deliver them, it was held that the insured could recover against the broker. *Turpin v. Bilton*, 5 Man. & G. 455. When a broker had effected certain policies which required alteration, and was requested by his principal "to do the needful" about them, and thereupon had them altered, but not so as to cover a loss which afterwards took place, it was held that, inasmuch as the alterations were such as a skilful insurance agent would have made, the broker was not liable to his principal. *Chapman v. Walton*, 10 Bing. 57. It has been held to be the duty of an insurance agent to give notice to his principal of his inability to effect an insurance according to special instructions. *Calland v. Oelrichs*, 5 Bing. (N. C.) 58. If a party undertakes to procure insurance without consideration, he is liable to an action on the case for negligence, provided he takes any steps in the business, but acts so negligently that his principal gets no benefit from the insurance. *Wilkinson v. Coverdale*, 1 Esp. 75. Under some circumstances a party may become liable to another merely by receiving an order to insure. These are: "First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. Second, when the

insured against the secretary of an insurance company for false representation as to the affairs of the company, whereby the plain-

merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them be such that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. Thirdly, if the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey, if he accept them, for it is one entire transaction. It is true, that, unless something has been held out by the person here to induce the other to think that he will procure insurance, he shall not be compelled to insure." *Bayley, J.*, in *Smith v. Lascelles*, 2 T. R. 187. So where a merchant had accepted an order for insurance, and limited the broker to too small a premium, in consequence of which no insurance could be procured, the merchant was held liable to his correspondent. *Wallace v. Tellfair*, 2 T. R. 188, n.

But if the insurance is to be effected on something not insurable, and the agent neglects to effect it, he is not liable. So when a mate, who was to receive as part of his wages three slaves, had ordered the defendant to insure them, which the defendant had neglected to do, it was held, that no action lay against the defendant, because seamen's wages are not insurable, and the plaintiff could not have recovered from the insurer had the policy been procured. *Webster v. De Tastet*, 7 T. R. 157; *Glaser v. Cowrie*, 1 Man.

& S. 52. See also *Maydew v. Forester*, 5 Taunt. 615; *Smith v. Cologan*, 2 T. R. 188, n; *Delaney v. Stoddart*, 1 T. R. 22.

The above are all English cases; but the American authorities are to the same effect. Where an agent was instructed to effect insurance on a vessel valued at \$4,000, to the extent of three fourths her value, which he neglected to do, the jury found a verdict against the agent on the footing of a valued policy for \$3,000. The court refused to disturb the verdict, on the ground that, though there was no express instruction to get a valued policy, such a desire was implied in the letter of instructions. *Miner v. Tagert*, 3 Bin. 204. So when the agent neglects to remit the premium, whereby the obligation does not attach, the agent is liable to the principal. Per *Calden*, Senator, in *Perkins v. Washington Ins. Co.*, 4 Cow. 645.

The measure of damages seems to be the amount which the principal would have received, had he been insured according to his directions. *Perkins v. Washington Ins. Co.* 4 Cow. 645; *Strong v. High*, 2 Rob. La. 103. If an agent agrees to procure insurance, with no instruction as to the amount, he is liable, in case of his neglect to effect the insurance, for the value of the subject to be insured. *Ela v. French*, 11 N. H. 356. So where an agent, employed to settle with the insurers for a total loss, settled for an average loss, and cancelled the policy, he was held liable to his employers, the insured, for the whole amount of the loss. *Rundle v. Moore*, 3 Johns. Ca. 36.

tiff was induced to effect an insurance with them.¹ And we know no reason to doubt that this action would be sustained by the courts of this country. In one very peculiar case, which we have elsewhere noticed, a part owner undertook gratuitously to effect insurance for another owner and failed to do so, and, an action being brought against him to recover damages for the loss of the uninsured vessel, Chancellor Kent, in a most elaborate decision, held that the defendant was not liable, because he had received no consideration for his undertaking.² We have already intimated that there may be room to doubt the decision, on the ground that a person who is employed to do any business, and who, if he does it, may bring an action for a fair compensation on a promise to pay, implied by the request, is not a mandatary, or an agent without compensation. And if a part owner in this case had effected the insurance, he was entitled to the same compensation which any other person might have claimed by way of commission or otherwise.

It has been held that, if such an agent enters upon the performance of his undertaking, he is bound to pursue his instructions, and is liable for any damage resulting from his failure to do so.³

¹ *Pontifex v. Bignold*, 3 Man. & G. 63.

² *Thorne v. Deas*, 4 Johns. 84. See *ante* p. 431, n. 2.

³ In *Fellowes v. Gordon*, 8 B. Monr. 415, Fellowes had received a note from Gordon, with instructions to collect the amount due, and in default of payment to attach a certain steamboat. Fellowes collected \$100, but did not attach the boat, in consequence of which Gordon's claim was lost, or at any rate indefinitely postponed. Gordon brought the action to recover from Fellowes the amount due on the note more than the \$100, which had been received. The court gave judgment for Gordon, and said: "Having undertaken the commission, and proceeded in its execution,

they [*Fellowes & Co.*] were bound to proceed with reasonable care and diligence, according to the terms of the mandate. . . . A bailee, receiving property under particular directions as to its disposition, impliedly undertakes to dispose of it according to those directions, and may be made liable for the loss consequent upon his failure or neglect to do so, and especially if he actually proceed with the business committed to him. . . . If [*Fellowes & Co.*] were unwilling to incur the trouble or responsibility or cost likely to arise under the instruction, they should have promptly declined the commission." See also *Coggs v. Bernard*, 1 Ld. Raym. 909; 1 Smith, Lead. Ca. *82. *Wilkinson v. Corndale*, 1 Esp. 75.

CHAPTER X.

EVIDENCE.

A POLICY is a written contract on the part of the insurers. It is as much a contract on the part of the insured as if he signed it, and the contract remains a written contract as to both parties. The general rules as to the law of evidence apply to it, but from the peculiar nature of the contract their application has given rise to peculiar questions and decisions. In this chapter we do not propose to consider the law of evidence as it is in itself, but the results of this law, when applied to the many questions arising out of the contract of insurance. The first question that we meet with, and the most general question as to all written contracts, is, when, to what extent, and for what purpose parol evidence or evidence from outside the contract is receivable to affect its construction or interpretation. Here the first and usual rule is, that no evidence from without is admissible to vary the contract or make it another contract than that which the parties made,¹ for the obvious reason that when the parties reduced their contract to writing, the necessary presumption is that they included in it all that they considered essential to their bargain. They may have added something which they intended to omit, or forgotten something which they intended to insert, but this cannot be shown by evidence for the purpose of making the contract other than they wrote it, for if it could there would no longer be any security or advantage in a written contract.² But evidence is admissible to

¹ Tait on Ev. 326. See also *Herring v. Boston Iron Co.*, 1 Gray, 134; *Renard v. Sampson*, 2 Kern, 561.

² "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination. But

if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract." Per Abbott, C. J., in *Kain v. Old*, 2 B. & C. 634. See to same effect *Vandervoort v. Smith*, 2 Caines, 155; *Mumford v. M'Pherson*, 1 Johns. 414; *Pickering v. Dowson*, 4 Taunt. 786. The reason of this rule is well stated in the *Countess of Rutland's*

explain the words they used if they are of doubtful meaning, or if they are shown by evidence to be equally susceptible of many meanings.¹ There is scarcely any question in the law that has been found so difficult, or has given rise to more multifarious adjudication, than how to draw the line between evidence which is not admissible because it would vary the contract, and that which is admissible because it does not vary but explains the contract. For the general rules on the subject we must refer to the works on evidence. As to policies of marine insurance, the distinction may be illustrated by the refusal of the courts to apply a policy, insuring one part owner in his own name,² to the interest of an-

case, 5 Rep. 26 a : "It would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory."

¹ In the case of *Colpoys v. Colpoys*, 3 Jacob's Rep. in C. C., the Master of the Rolls thus states the rule and its reason : "Where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed, if in such cases the court were to reject the only mode by which the meaning could be ascertained, viz. the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense and the law of England warrant the departure from the general rule, and call in the light of extrinsic evidence." In *Peisck v. Dickson*, 1 Mason, 11, Mr. Justice Story said : "There seems indeed to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities ; and that is, where the words are all sensible and have a settled meaning, but at the same time consistently

admit of two interpretations, according to the subject-matter in the contemplation of the parties. In such a case, I should think that parol evidence might be admitted to show the circumstances under which the contract was made and the subject-matter to which the parties referred. For instance, the word 'freight' has several meanings in common parlance ; and if by a written contract a party were to assign his freight in a particular ship, it seems to me that parol evidence might be admitted of the circumstances under which the contract was made, to ascertain whether it referred to goods on board of the ship, or an interest in the earnings of the ship, or, in other words, to show in which sense the parties intended to use the term." See also *Bunn v. Winthrop*, 1 Johns. Ch. 329 ; *Le Farrant v. Spenser*, 1 Ves. Sen. 97 ; *Avery v. Stewart*, 2 Conn. 69 ; *Williams v. Gilman*, 3 Greenl. 276.

² This is well illustrated in the case of *Finney v. Bedford Commercial Ins. Co.*, 8 Met. 348, where *Dewey, J.*, in giving the opinion of the court, said : "The real question here is, whether a policy, made in the name of a particular person, who is the owner of a small proportion in interest of the property insured, without any words indicat-

other part owner of whom the insured is neither agent nor trustee. Cases may be cited applying the same rule to fire policies, upon principles which would be equally applicable to marine policies.¹

ing an intention to insure beyond his own interest, can be made effectual to cover the interest of others, upon parol proof that the application for insurance was for such others, as well as for the party named, and that this was well known to the insurers, and that it was the intention and understanding of all the parties, that the policy was to cover the interest of all the owners. The general rule excluding parol evidence, when offered to contradict or vary the terms of a written contract, seems to forbid it. When the parties have put their agreement into writing, and the terms of it are plain and direct, leaving no uncertainty as to the nature of it, we must treat it as the whole engagement of the parties; and this excludes all parol evidence of conversations or declarations of the intentions of the parties tending to show another and different contract. This principle, we apprehend, applies as well to contracts of insurance as to other agreements." In *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419, it was held that a policy in the name of one part owner, with the words added, "as property may appear," without the clause stating the insurance to be for the benefit of all concerned, does not cover the interest of another joint owner; the words "as property may appear" being considered as applicable to the property of the one in whose name the policy issued. *Marshall, C. J.*, says: "The contract ought to have been so expressed as to show that the interest of some other than Graves was secured, if such was to be the effect of the instrument. A policy, though construed liberally, is

still a special contract; and under no rule for proceedings on a special contract could the interest of copartnership be given in evidence on an averment of individual interest, or the averment of the interest of a company be supported by a special contract relating in its terms to the interest of an individual." See also *Stackpole v. Arnold*, 11 Mass. 81; *Pearson v. Lord*, 6 Mass. 84; *Murray v. Columbian Ins. Co.*, 11 Johns. 302; *Turner v. Burrows*, 5 Wend. 541; *Finney v. Warren Ins. Co.*, 1 Met. 18.

¹ The case of *Holmes v. Charlestown Mutual Fire Ins. Co.*, 10 Met. 211, was as follows: An application for insurance against loss of a meeting-house and its fixtures, by fire, was made to a mutual fire insurance company, that could not, by statute and its own by-laws, insure upon any building an amount exceeding three fourths of the value thereof; and, in the application, the value of the building was stated to be \$4,000. The company executed a policy, insuring \$3,500 on the meeting-house and fixtures. The house was destroyed by fire, and the company paid \$3,000 to the assured towards the loss. The present suit was then brought on the policy, to recover the balance of \$500. It was decided that the plaintiffs could not recover. *Hubbard, J.*, in delivering the opinion of the court, says: "On referring to the application, the value of the building is agreed to be \$4,000; and the plaintiffs now ask liberty to show that it was, in fact, worth a much larger sum at the time of the insurance. But such evidence is inadmissible; and

As policies of insurance are partly written and partly printed, the general rule has been applied to them, that greater force is given

the valuation, if made in good faith, is binding on both parties. The value being fixed at \$ 4,000, the contract does not, by law, cover more than three fourths of that sum; for the fixtures are a part of the building itself, and are included in the estimates of its value." In this case, the rules and regulations referred to are regarded as representations, and are considered as part of the contract, in the same manner as if they had been introduced into the body of the policy. "In fire policies, representations, so far as they are distinctly referred to in the policy, become parts of the contract, and are to be construed with it." Per *Hubbard, J.*, in same opinion. Another case, illustrating the same point, is that of *The Mutual Safety Ins. Co. v. Hone*, 2 Comst. 235. There in a policy of reinsurance, the underwriter agreed to "reinsure," and to "make good unto the reinsured all such loss or damage (not exceeding the sum specified) as shall happen by fire, the loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen." An attempt was made to introduce evidence of a local custom among insurers, to pay only such a proportion of the loss as the amount of reinsurance bears to the original policy. It was held that there was no ambiguity in the terms employed, and that the usage went to contradict the plain, unequivocal language of the policy, and was, therefore, inadmissible. "The usage is, in this case, if admitted, to prove that the word 'all' means less than half." The case of *Stacey v. The Franklin Fire Ins. Co.*, 2 Watts & Serg. 506, was substan-

tially as follows: The first insurance by a fire office was upon "merchandise generally, including liquors and groceries, contained in store No. 37 South Wharves, for the use of whom it may concern,—say, merchandise, without exception." A record was made in another office, on coffee and other merchandise, without exception, either on board the *J. S.*, in this port, or in the brick store, No. 37 South Wharves, in the city of Philadelphia. A loss happened, by fire, on goods in the store, not brought in the *J. S.*, or landed therefrom. It was held, that facts and circumstances, out of the instrument, are inadmissible to show the intention of the parties, as to the second policy being a specific insurance on other goods, not covered by the first.

See, further, the important case of *Dodge v. Essex Ins. Co.*, 12 Gray, 65, in which an open policy of insurance "on property on board vessel or vessels at and from any port or ports in the United States to any other port or ports in the United States, as per indorsements, with liberty to stop at any intermediate ports or places," bore this indorsement: "Liberty is given to stop at Norfolk or other ports for trade, by adding one eighth per cent for each. This policy attaches as follows: schooner *Potomac*, Norfolk to Salem or Boston." The *Potomac* sailed from Norfolk, and arrived at Salem, where the master was informed at the plaintiff's counting-room that his port of discharge was Boston, and he received orders to go there; but the schooner was wrecked on her passage. Evidence of former usage under similar policies between the same parties to put into Salem, and then pro-

to the written words, if there be any conflict between them, because the written words may be supposed to have been chosen by the parties as appropriate to that very bargain.¹ The date of a

ceed to Boston, and to settle with the underwriters afterwards by paying an additional premium of one eighth per cent, did not affect the policy. *Shaw, C. J.*, says: "The terminus *a quo* is Norfolk, and the terminus *ad quem* is either Salem or Boston, as the assured might direct. It is left uncertain by the contract, but it must be made certain at some time, and must be determined by the court. At whatever time that election might be made, within the stipulated limits, whether at the time of departure from Norfolk or at any time before arriving at the dividing point in the voyage, or at what other time, it must be before the termination of the risk, and that risk will terminate on arrival at Boston or Salem, whichever shall first happen. This appears to be the clear legal result of the contract; and we see nothing in the anterior usage or practice of the parties to vary this result." A similar case is that of *Seccomb v. Provincial Ins. Co.*, 10 Allen, 305. This was an action on a policy of insurance on a vessel from New York to ports in South America, and thence to ports of discharge in the United States, with an indorsement thereon of, "Liberty to deviate by going to port or ports in Europe, by paying an equitable premium therefor." This does not include a distinct and independent voyage, having no connection with the general objects and purposes of the voyage insured, and any evidence of a usage to vary the legal meaning of the deviation clause was held inadmissible. So too of any conversation, at the time it was written, between the underwriters and the assured, tending

to control the meaning of the clause. See also *Sheldon v. Hartford Fire Ins. Co.*, 22 Ct. 235; *Liddle v. Market, &c. Ins. Co.*, 4 Bosw. 179; *Mercantile Ins. Co. v. State Ins. Co.*, 25 Barb. 319.

¹ The case of *Coster v. The Phoenix Ins. Co.*, 2 Wash. C. C. 51, is to the point. The printed clause in a policy liberated the underwriters from particular average to any amount on articles of a perishable nature, and on other articles where the loss amounts to less than five per cent. The written clause discharges the underwriters from all responsibility for average losses, whether general or particular, under ten per cent. *Washington, J.*, says: "These clauses are inconsistent with each other, and one or the other must give way. If the written clause varies from the printed, it is evidence of a special contract made in that particular case, different from the usual contract of insurances; and it must necessarily be considered as the real agreement of the parties. If the written and the printed clauses can be reconciled by any fair construction, it ought to be done; if they cannot, the former must prevail." In the case of *Wallace et al. v. Ins. Co.*, 4 La. 289, *Porter, J.*, in delivering the opinion of the court, says: "The written parts of a policy control those which are printed, but this principle can only receive a proper application in cases where it is not possible to satisfactorily reconcile them." In case of *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389, *Wright, J.*, says: "If there is any repugnancy in the clauses, in construing the instrument (a policy), the written should prevail over that

contract implies that it was then delivered and went into effect. The word "date" being only a contraction of *datum*, "given." But this is not a part of the contract which is closed against evidence.¹ And it may be proved that it was delivered and took effect on a different day.²

SECTION I. — *Of the Making of the Contract.*

THE principal question which has arisen here arises when a plaintiff claims to be actually insured by one who was his agent. To prove this agency, no particular evidence is necessary. The production of a letter directing the insurance is sufficient.³ And if the question arises whether the authority was given before the work was done, the postmarks on the letters are, unless contradicted, evidence that the letter was posted when and where the postmark indicates.⁴ And it is a familiar rule, that if a letter

which is printed." Lord *Ellenborough* states the same principle in the case of *Robertson v. French*, 4 East, 130: "The words in a policy superadded in writing are entitled, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning." See also *Wall v. Howard Ins. Co.*, 14 Barb. 383; *Bargett v. Orient Ins. Co.*, 3 Bosw. 385; *Moore v. Perpetual Ins. Co.*, 16 Mo. 98.

¹ In the case of *Lorent v. So. Carolina Ins. Co.*, 1 Nott & McCord, 505, Mr. Justice *Richardson* says: "The written date is but *prima facie* proof of the true date, and may be contradicted by extrinsic testimony. See also *Breck v. Cole*, 4 Sandf. 79; *Abrams v. Pomeroy*, 13 Ill. 133; *Stone v. Bale*, 3 Lev. *349.

² In the case of *Hall v. Cazenove*, 4 East, 477, Lord *Ellenborough* held that

a deed might be proved to be indented, made, and concluded on a day subsequent to that on which the deed itself is stated on the face of it to have been indented, made, and concluded. See further, to same effect, *Davis v. Jones*, 17 C. B. 625.

³ *Arcangelo v. Thompson*, 2 Campb. 620. Lord *Ellenborough* here held, that the production of a letter, dated abroad, and addressed to J. S., in England, with the English ship-letter postmark upon it, which directed a policy to be effected, is sufficient to prove that J. S. was "the person residing in Great Britain, who received the order for, and effected such policy."

⁴ It was decided in *Rex v. Plumer, Russ. & Ry.* 264, that the post-office marks, proved to be such, are evidence that the letters on which they are were in the office to which those marks belong, at the dates those marks specify. See also *Rex v. Johnson*, 7 East, 65, where the fact of the postmark on a letter was admitted as evidence that it had been put into the office denoted by

directed with sufficient accuracy is sent by mail, it is a presumption of law that the party to whom it was addressed received it by due course of mail.¹ The subscription to the policy must be proved in the usual way of proving signatures. If the subscription be by an agent, and the question is as to his authority, evidence that the agent had often subscribed policies in the party's name, who had known and sanctioned this, and thus or otherwise held him out to the world as having authority to do so, has been held sufficient.² It has been doubted, however, whether this proof was sufficient, unless it was strengthened by the additional fact that the insurer had been in the habit of paying losses on policies so subscribed.³ We should be disposed to say that whether such evidence was admissible was a question of law, and should answer it in the affirmative, and that whether there was a sufficiency of the evidence when admitted was a question of fact for the jury.⁴

the postmark. In *Fletcher v. Braddyll*, 3 Starkie, 64, it was held, by *Halroyd, J.*, that the postmark upon a letter was *prima facie* evidence as to the existence of the letter at the time of the date. See also *Langdon v. Hulls*, 5 Esp. 156; *New Haven County Bank v. Mitchell*, 15 Ct. 206. The rule is different, however, in criminal cases. *Rex v. Watson*, 1 Campb. 215.

¹ *Saunderson v. Judge*, 2 H. Bl. 509; *Woodcock v. Haldsworth*, 16 M. & W. 124; *Bussard v. Levering*, 6 Wheat. 102; *Ogden v. Cowley*, 2 Johns. 274; *Shed v. Brett*, 1 Pick. 401.

² In *Neal v. Erving*, 1 Esp. 61, it was proved that the defendant's name had been subscribed to a policy by one Hutchins. No special authority was proved in this instance. Lord *Kenyon* held, that his having subscribed several policies in the defendant's name was sufficient evidence of that authority to charge the defendant.

³ In the case of *Courteen v. Touse*, 1

Campb. 43, the policy was signed by one Butler, for the defendant. A witness proved Butler's handwriting, and swore that he had often observed him sign policies for the defendant; had not seen any power of attorney from the defendant to Butler; nor did he know that the defendant had given Butler any authority to sign this specific policy, and he did not know of any instance in which the defendant had paid a loss upon a policy so subscribed. Lord *Ellenborough* held, that the proof of agency must be carried further. How much further is probably indicated by his decision in the case of *Haughton v. Ewbank*, 4 Campb. 88, where he held, that it was sufficient proof of the agency, that the defendant was in the habit of paying losses upon policies so subscribed by the agent in his name.

⁴ See *Brocklebank v. Sagrue*, 5 C. & P. 21; *Guthrie v. Armstrong*, 1 Dowl. & Ry. 248; *Mead v. Davison*, 3 Ad. & Ell. 303.

SECTION II. — *Compliance with Warranties and Conditions.*

ALL express warranties may be regarded as conditions precedent, and therefore the policy does not attach until they are complied with.¹ These warranties and conditions are of different kinds and susceptible of different kinds of proof, and perhaps of different degrees of proof. There are some things which if the insured did he could prove at once by direct and conclusive evidence, and other things which it would be difficult or impossible so to prove. The law would always be reasonable in its requirement of proof. It is a general rule that everything is to be proved by the best evidence the nature of the thing admits, and can be proved by secondary evidence only when the absence of the first evidence is accounted for. In cases which have arisen under policies, the very nature of the thing to be proved sometimes accounts for the absence of direct and conclusive evidence, and therefore admits secondary evidence to be sufficient unless it be contradicted. As in a warranty of nationality or of sailing under convoy.² The word "warranted" may be used when in fact it means only an exception.³ If the insured warrants free from average, and claims no loss which has anything to do with average, he offers no proof about this warranty. So if the phrase be "warranted against war risks," "against a loss in a certain place," or "against unlawful trade," he offers no evidence unless the question arises whether the case comes within these exceptions. But a warranty of national char-

¹ In case of *Craig v. United States Ins. Co.*, 1 Pet. C. C. 410, *Washington*, J., says: "Every warranty in a policy, whether express or implied, constitutes a condition precedent. The plaintiff cannot, in any instance, where he has entered into a warranty, recover against the underwriters, without first averring and proving performance of those stipulations." See also *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 159.

² Thus, in case of *Arcangelo v. Thompson*, 2 Campb. 620, it was held to be *prima facie* evidence of nationality of a ship, that she carried the flag of that particular nation, at times when she

was free from all danger of capture, and that the captain addressed himself to the consul of that nation in a foreign port. So, in the case of *D'Israeli v. Jowett*, 1 Esp. 427, *Eyre, C. J.*, held the log-book of a man-of-war, which convoyed the fleet, to be evidence of the time of its sailing. He says, also, that, as the captain swore that he sailed with the convoy on a certain day, and as there was no evidence to contradict, the point was settled.

³ See *Kingsley v. N. E. Ins. Co.*, 8 Cush. 398; *Westfall v. Hudson R. F. Ins. Co.*, 2 Dev. 490.

acter or neutral character, or to sail with license or with convoy, or within such a time or from such a place, must be proved by him.¹ Where the warranty is in its terms negative, as that the ship shall not within a certain period be in certain seas or certain latitudes, or that goods of a certain kind shall not be carried, we should say that he need offer no proof concerning this warranty, unless evidence produced by himself or by the other party indicated a breach of it. Hitherto we have spoken only of express warranties or conditions. Of implied warranties, as of sea-worthiness and the like, it may be said as we have seen in a former chapter, that the insured need offer no evidence of compliance with these, unless in rebutter or explanation. This at least is the general rule.

SECTION II. — *Proof of Interest.*

If the insurance is on a ship, the best evidence will be documents of title; but actual possession is a very strong *indicium* of property in this as in all cases of chattels.² And in one case

¹ In 2 Condry's Marshall, 714, it is said: "In the case of a warranty that the thing insured is neutral property, it is usual to give general evidence of the truth of that warranty, and leave it to the defendant to falsify it, or prove a breach or forfeiture of it." In the case of *The Ocean Ins. Co. v. Francis*, 2 Wend. 64, *Walworth*, Ch., held that, where a vessel is warranted as being British, general evidence of her national character is *prima facie* sufficient, until doubts are raised by proof on the other side. In case of *Catlett and Keith v. Pacific Ins. Co.*, 1 Paine, 594, the national character of a vessel was held to be shown by the assured in the fact of having on board a register of the particular nation. See also *Craig v. U. S. Ins. Co.*, Pet. C. C. 410; *Arcangelo v. Thompson*, 2 Campb. 620; *Thornton v. Lance*, 4 Campb. 231; *Murdock v. Chennango County Mutual Ins. Co.*, 2 N. Y. 210.

² In the case of *Bas v. Steele*, 3 Wash. C. C. 381, *Washington*, J., says: "Possession and assertion of ownership are sufficient evidence thereof. Documentary evidence is not necessary, unless the asserted ownership is denied." It was held in *Sharp v. U. S. Ins. Co.*, 14 Johns. 201, that the register of a ship, which was in the name of other persons, was not even *prima facie* evidence to show that the plaintiff (who was in possession of the ship, and who insured her) was not the owner of the vessel. See also *Lamb v. Durant*, 12 Mass. 57, where a sale, by a partner, of a ship, accompanied by transfer of possession, was held to pass the property, even though there had been a prior sale by a copartner. *Vinal v. Burrell*, 16 Pick. 401; *U. S. v. Amedy*, 11 Wheat. 392; *Hozey v. Buchanan*, 16 Pet. 215; *Robertson v. French*, 4 East, 130; *Thomas v. Foyle*, 5 Esp. 88.

where the evidence showed that the plaintiffs held the ship by a bill of sale to them, possession of the ship was held to be sufficient evidence to render the production of the bill of sale unnecessary.¹ The register of the ship in the proper custom-house is required by law, and is undoubtedly important evidence in regard to the title, but the registering of the vessel is the act of the owner himself; and on this ground it has been said that, if it be offered by the party in whose name the ship is registered, it is no evidence of ownership. Mr. Phillips is of this opinion, and cites many authorities.² That it is rebuttable evidence cannot be doubted, but we should not be inclined to say that in an action under a policy of insurance it was inadmissible or of no value. The more difficult question is, whether it be necessary. This indeed involves a prior question, whether the property in a ship can pass except by written transfer. That such is the usual and ancient mode of transfer is certain.³ It is indeed so universal, that very few cases arise in which property in a vessel is founded on mere oral transfer. But we have never been able to see that in this country it is essential, or, in other words, that neither a ship nor any interest in a ship can pass by oral transfer.⁴ The statute of the United States of

¹ *Robertson v. French*, 4 East, 130. It was held in this case, in an action on a policy, that the property of a ship may be proved by parol evidence of the possession of the assured, and that this was not disproved by showing a prior register in the name of another and a subsequent one to the same person. In *Thomas v. Foyle*, 5 Esp. 88, Lord *Ellenborough* held it to be sufficient proof of ownership that the one claiming to be owner had ordered and paid for stores for the ship; and he did not consider it necessary to have a bill of sale produced to substantiate it. In *Woodward v. Larkin*, 3 Esp. 286, Lord *Eldon* said: "The register states that the ship in question was a British built ship, captured by the enemy; that the register was destroyed; that she was sold to a neutral subject; was then become the property of a British subject, and regis-

tered there as the sole property of Woodward and Tarras. Under these circumstances, there is no bill of sale necessary. These facts are evidence of property sufficient to call on the defendant to explain in it." It was decided in *Wendover v. Hogeboom*, 7 Johns. 308, that a bill of sale was not essential to transfer the property in a vessel, but that the same passed by delivery, like any other chattel. See also *Carral v. Boston Marine Ins. Co.*, 8 Mass. 515.

² 2 Phillips, 657 to 660.

³ *The Sisters*, 5 Rob. Adm. 155; *Weston v. Penniman*, 1 Mason, 306.

⁴ The general rule of the common law, in respect to the sale of every species of personal property, is, that an oral sale for a valuable consideration, with delivery of possession, passes the property in the thing sold absolutely,

1850, which declares that no bill of sale, or conveyance of any vessel or part of any vessel of the United States, should be valid

and no writing can do it more effectually. The earlier statutes of registration make the express exception to this principle of the sale of ships; but it was with a definite view and for a specific purpose. Mr. Justice *Story*, in the case of *Weston v. Penniman*, 1 *Mason*, 306, says, in reference to the general subject: "The registry acts have not in any degree changed the common law as to the manner of transferring this species of property." The general opinion, supported by the usage of merchants and the statements of writers of authority, that the transfer of a ship by a written instrument of some kind is usual, proper, and necessary, has not, we think, the force of law.

The English Statute of Registry of 26 Geo. 3 differed from our act of 1792 in this: the English statute makes a transfer of a ship wholly void, if not in writing and recorded; ours only denies to a vessel transferred without writing or registry the privileges of an American ship. Thus it will be seen that the American statute does not touch the title of the ship, only its peculiar privileges. In the act of 1850, referred to in the text, there is a proviso that a transfer of any kind, which before the statute was adequate to pass the property in the ship, is now perfectly valid in reference to persons having notice of it. So far as the decisions of this country, out of admiralty, go, we have very positive declarations of common-law courts, that the property in the ship may pass like that of any other chattel, without any instrument in writing. For this position we can cite the following cases: *Wendover v. Hogeboom*, *Anthony's N. P.* 121, 7 *Johns.* 308; *Taggard v. Loring*, 16 *Mass.* 336; *Bixby v.*

Franklin Ins. Co., 8 *Pick.* 86; *Weaver v. The S. G. Owens*, 1 *Wallace*, Jun. 359; *Leonard v. Huntington*, 15 *Johns.* 298; *Badger v. Bank of Cumberland*, 26 *Me.* 428; *Barnes v. Taylor*, 31 *Me.* 329; *Mitchell v. Taylor*, 32 *Me.* 494. In the case of *Weston v. Penniman*, 1 *Mason*, 306, 317, the decision by Mr. Justice *Story* distinctly sustains a merely equitable title, resting upon no bill of sale whatever. Thus far, then, we have no case in any American court, in which the rights of any party are made to depend upon the rule in reference to the necessity of a written instrument of transfer. Even in *Ohl v. Eagle Ins. Co.*, 4 *Mason*, 172, 390, when we look at the facts in the case, the force of Mr. Justice *Story's* language, "I think that a title to a ship cannot pass by parol, when she is sold to a purchaser," is much abated. There the plaintiff had received a bill of sale of the ship to himself and another; and he undertook to show that the bill of sale was in fact intended to pass the property in the whole ship to him alone. But says *Story*: "The legal title passed to both; and to introduce the parol proof would be to contradict the direct allegations of the deed." This was of course made impossible by the rules of evidence. So far as this case is to be regarded as authority, we must consider the preceding remark of the court as *obiter*, or as applicable only to facts like those then under consideration. Our conclusion then is, that no case is to be found in America in which a purchaser in good faith of a ship, or a part of a ship, was dispossessed of his property merely because the transfer to him had not been made by a written instrument.

against any person other than the grantor, his heirs, and devisees, and persons having actual notice thereof, unless it be recorded in the proper office of the collector of customs, would seem to imply that it would be valid as against the grantor or those deriving title from him, and persons having actual notice thereof. Even in England, where the registry laws on this subject are quite different from our own, it has been held that one insured on a ship may prove his interest otherwise than by proving that the ship is registered in his name.¹ Our notes will show an uncertainty, not to say a conflict, upon the question, how far the registry or non-registry affects the rights of the insured.² It should, however, be remarked that, while the register is not conclusive proof of the

¹ It was held in the case of *Robertson v. French*, 4 East, 180, that the property of a ship may be proved by parol evidence of the possession of the assured, without resorting to the register. Per Lord *Ellenborough*. See also *Thomas v. Foyle*, 5 Esp. 88, to the same point.

² It appears to be the settled doctrine in the English courts, that the register is a private instrument and the mere declaration of the party making it. Some of the earlier American cases hold it to be a public record or title. *U. S. v. Johns*, 4 Dall. 412; *Coolidge v. N. Y. F. M. Ins. Co.*, 14 Johns. 315. But the weight of authority here tends to the same doctrine as in England. See an unqualified statement to this effect in *Jones v. Pitcher*, 3 Stew. & Port. 135, 155.

It follows that the register is not even *prima facie* evidence to charge those who are not shown to be parties to it, by their own act or assent, although their names appear on its face. *Tinkler v. Walpole*, 14 East, 226; *Baldney v. Ritchie*, 1 Stark, 338; *Pirie v. Anderson*, 4 Taunt. 652. See, however, *Stokes v. Carne*, 2 Campb. 339. As to the fact of ownership, the registry in this country is only *prima facie* evidence

against the party named therein as owner. *Ring v. Franklin*, 2 Hall, 1; *Weston v. Penniman*, 1 Mason, 306; *Colson v. Bouzey*, 6 Greenl. 474; *Lord v. Ferguson*, 9 N. H. 380.

From its very nature, the registry can only be evidence of ownership at the time it was made, and the continuation of the exclusive title in the parties whose names appear on its face is a mere presumption of fact, liable to be disproved by competent evidence of a subsequent transfer to others. *Colson v. Bouzey*, *supra*; *Vinal v. Burril*, 16 Pick. 401. Certainly the registry, in this country is not conclusive evidence of property against those who are parties to it, and not even *prima facie* evidence between third parties, and is not by force of the statute of registry made *exclusive* evidence of ownership in such cases. *Lord v. Ferguson*, 9 N. H. 380; *Hozey v. Buchanan*, 16 Pet. 215. In *Weaver v. The S. G. Owens*, 1 Wallace, Jun. 365, the court held generally, that, in a question of ownership *inter partes*, the register is *prima facie* evidence of title in the person in whose name the ship is registered, liable to be rebutted by proof of actual ownership in another. See, however, *Lincoln v. Wright*, 23 Penn. State, 76; *Ligon v.*

ownership of the party who appears in it as owner, it has been held in England to be conclusive *against* the ownership of one not named as owner in the register.¹ We have said that possession is an *indicium* of ownership, and the question may arise, How is possession itself proved? This may be done by acts of control and possession; and words connected with these acts would be admissible evidence. But mere words would have but little force.²

Whatever may be the force of the necessity of registry in the courts of one's own country, it has been held in England that the courts of that country would not defeat his insurance on a vessel on the ground that the registry laws of his own country had been violated.³ This is but an application of the doctrine established in England in maritime cases; where, upon questions of illegality, the Courts pay no regard to the laws of a foreign country. This rule has been so far adopted by our courts, that it would probably lead them to a similar decision.

An interest in freight is proved by proving in the first place an interest in the vessel sufficient to sustain a claim of freight, and then that goods were shipped, or some contract entered into, or some act done, which was sufficient to give to the insured an insurable interest in the freight.⁴

An interest in goods is proved by evidence of having bought Orleans Nav. Co., 19 Mart. (La.) 682; *Dudley v. The Steamboat Superior*, U. S. Dist. Ct. Ohio, 3 Am. Law Reg. 622.

¹ See *Marsh v. Robinson*, 4 Esp. 98. See, further, *Fraser v. Hopkins*, 2 Taunt. 5.

² In *Pirie v. Anderson*, 4 Taunt. 652, it was held that proof of one of three plaintiffs having conversed with a broker about stopping the cargo as security for the freight amounted to nothing when offered to show their interest in the ship. In *Tullock v. Boyd*, 1 Holt, 487, Mr. C. J. *Gibbs* thought the expressions of an agent to the effect that the ship was "his" were not conclusive against him, and were subject to the explanation that he was agent.

³ In *Rhind v. Wilkinson*, 2 Taunt. 237,

it was held that an American, who was owner of a ship only as trustee, and would not thereby be entitled to the privileges of the American flag under the laws of his own country, had a sufficient interest to maintain an action on a policy.

⁴ In *Camden v. Anderson*, 5 T. R. 709, two parties purchased a ship under a bill of sale, and afterwards took in two other partners, but there was no transfer of the ship to them jointly with the others, and it was held that, as these four partners had neither a legal nor an equitable title to the ship, so they had no insurable interest in the freight. In giving the opinion, Lord *Kenyon*, C. J., said: "The right to freight results from the right of ownership, and if the plaintiffs have no title to the ship, they have

and paid for them, or by any document which shows a transfer of the title to the insured, or by showing possession and control of them by the insured, or that he has acted as an owner; as, for example, that he shipped the goods; for any such fact, although rebuttable, is sufficient until contradicted.¹ The usual evidence, and therefore the proper evidence (unless its absence is accounted for), is the bill of lading. By this the master acknowledges that he has received goods from one party, the consignor, to be delivered to the consignee. In point of fact, the goods are almost as likely to be the property of the one as of the other; perhaps they are more frequently the property of the consignor than of the consignee. But the presumption of law is, that the consignee is the owner, unless the bill of lading itself says otherwise.² Either of these parties has an insurable interest. But if one is insured and the property is in the other, there must of course be proof of authority. It has been held in England, that the bill of lading proved only that the goods were shipped or were in existence.³

no interest in the freight." In *Robins v. N. Y. Ins. Co.*, 1 Hall, 325, a part of the freight had been advanced by the charterer. The court say: "The advance of the freight gives no right to insure beyond the amount of the advance. But to enable him to recover, he must prove the fact of advance. His covenant or agreement to make it is not sufficient. In most cases the charterer will have a lien upon the freight for the advances he makes the ship-owners; that lien gives him an interest under the charter-party, which he may insure."

¹ In *Robertson v. French*, *supra*, the interest in goods was proved the same way as interest in the ship, viz. by parol proof of possession. So in *Thomas v. Foyle*, 5 Esp. 88, the fact of the owner having ordered and paid for stores for his ship was *prima facie* evidence sufficient of ownership in them.

In *Amory v. Rogers*, 1 Esp. 209, the fact of a person having exercised acts of ownership in directing the loading, &c., of the ship, was sufficient proof of interest.

So in *McAndrew v. Bell*, 1 Esp. 373, the production of the bill of lading, and the evidence of the captain of the ship that he had the goods mentioned in it on board, was sufficient to prove an interest in the insured. In *Peyton v. Hallett*, 1 Caines, 363, it was held sufficient proof of interest in cargo that the articles were bought by the plaintiff, and were put on board. See further, to same effect, *Marsh v. Robinson*, 4 Esp. 98; *Savage v. Corn Exch. Fire & Inland Nav. Ins. Co.*, 4 Bosw. 1.

² *Hibbert v. Carter*, 1 T. R. 745, decides that the indorsement and delivery of a bill of lading to a creditor *prima facie* conveys the whole property in the goods from the time of its delivery. This may be varied by intention of parties. In *Carruthers v. Sheddon*, 6 Taunt. *17, it was held that the consignees of the cargo had an insurable interest to the whole amount of it. To the same effect, *Seagrave v. Union Marine Ins. Co.*, Eng. C. L. Reps. 1866, p. 304.

³ In *Haddon v. Parry*, 3 Taunt. 303, a

We know no such ruling in this country, and should suppose the bill of lading would be not only admissible evidence but presumptive evidence of ownership. Mr. Justice Washington did not consider that the bill of lading of the outward cargo was evidence of an interest in a homeward cargo, without further proof that the outward cargo was applied to procure the homeward cargo.¹ But the same judge admitted in the same case the written certificate of a deceased supercargo. Where the insurance was on goods in a time policy, it was held that the interest of the assured in the cargo carried in any particular passage must be proved in the same manner as if the policy had been on that voyage only.² Interest in profits would follow an interest in the goods. If the policy be not a valued one, the value of the interest, whatever the subject-matter of the insurance may be, must be proved by proper evidence. And if it be a valued policy, and the whole of the interest valued be not at risk, the proportion of it which is must be proved.

SECTION IV.—*Proof as to a Sufficient Description.*

It is obvious that after the insured has proved that he made or authorized the insurance, and that he has an insurable interest in the subject-matter thereof, he may still be held to prove that this falls within the description in the policy, both as to the subject-matter and as to the time and place or other circumstances of the risk. Thus the question has arisen, What is comprehended in the word "cargo" both in England and in this country?³ And when

bill of lading, signed by a master of a vessel, since deceased, for goods to be delivered to a consignee, but guarded by saying "contents unknown," is not evidence of property in the consignee. In *Dickson v. Lodge*, 1 Starkie, 226, Lord *Ellenborough* held that a bill of lading signed by the captain is not evidence to prove the plaintiff's interest in the goods. See also *McAndrew v. Bell*, Esp. 373, *supra*; *Howard v. Tucker*, 1 Barn. & Ad. 712, in which the court say: "The point contended for is, that an owner having given a bill of lading, by which freight appears to have been

paid before the ship's departure from India, is still not estopped, as against the assignee of such bill, from claiming freight when the vessel arrives here. We think such a position cannot be supported." So in *Berkley v. Watling*, 7 Adol. & El. *Pattison*, J., says: "The bill of lading made out by the consignee's agent is not conclusive between consignee and the defendants."

¹ *Beale v. Pettit*, 1 Wash. C. C. 241.

² *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429.

³ *Houghton v. Gilbert*, 7 Car. & P.

evidence has been required, in a policy on a certain voyage, that the ship had sailed on that voyage, or that cargo had been shipped on that voyage, circumstantial evidence was admitted which was anything but conclusive in its character.¹

SECTION V. — *Proof of Loss.*

THE insured must prove an extraordinary peril of the kind insured against, and a loss by that peril.² It is a very frequent subject of inquiry, whether the damage which is unquestionable as a fact was caused by a peril insured against or by some other cause. The burden of proof is of course on the insured, first, to prove the damage, and then to show that it arose from such a peril; and it is admissible evidence against him to show that similar damage had been caused to similar goods by other means.³

701. See *ante*, vol. 1, p. 84, n. 3, and cases there cited.

¹ Thus in *Marshall v. Parker*, 2 Campb. 69, a license was held *prima facie* evidence that, when a ship left her port of outfit, she sailed upon the voyage insured. So in *Cohen v. Hinckley*, 2 Campb. 51, in order to prove that when a vessel left the port of outfit she was bound upon the voyage insured, the convoy bond, mentioning the port of destination in the common form, was admitted as *prima facie* evidence. In *Johnson v. Ward*, 6 Esp. 47, a copy of the searcher's report of the cargo of a ship, even though the witness producing it did not know of its correctness, was admitted as evidence. So in the same case was the affidavit of an agent to prove a fact against his principal, when the principal had accepted and used it in an application to the court.

² In *Coles v. Marine Ins. Co.*, 3 Wash. C. C. 159, *Washington, J.*, says: "If the loss arose from the ordinary circumstances of such a voyage as this was (from a port on Brazil coast to Canton), as from sea damage or the wear and tear which, without the action of any

extraordinary cause, was to be expected, the insurer is not liable. But if it happen in consequence of the violence of the winds and waves, running on rocks, or the like, these are perils against which the insurer agrees to indemnify. It is not sufficient for the insured to prove that there were storms during the voyage, unless he can fairly trace the injury sustained to that cause." See, further, *Flemming v. Marine Ins. Co.*, 4 Whart. 59, where it is said: "It is not sufficient that the goods should appear to have been in a damaged state when they were landed, to entitle the plaintiff to recover; but it ought to appear that that damaged state was occasioned by some extraordinary disaster which occurred on the voyage, such as a violent storm or hurricane, the effects of which neither human foresight nor efforts could well guard against or prevent." The same principle is stated in *Coffin v. Phoenix Ins. Co.*, 15 Pick. 291; *Louisville Mar. Ins. Co. v. Bland*, 9 Daw. 143; *Marcy v. Sun Ins. Co.*, 14 La. An. 254; *Trew v. Royal Ass. Co.*, 5 Hurlst. & Norm. 211.

³ In *Bradford v. The Boylston F. &*

It is never necessary to prove what the law presumes, even by a presumption of fact; and Lord Kenyon applied this to an action for barratry of the master, holding that the plaintiff need not prove that the master was not owner, because this would be presumed.¹ And it was held in the same case, that the person was guilty of the misconduct, on proof that he was acting as master, without proof that he was so actually. Nor is it necessary for the insured to prove, or permissible for the insurer to prove in defence, anything beyond and in addition to the conditions of the policy.²

We have seen that an abandonment, besides being a transfer of the salvage and notice of the loss, must give to the insurers such information concerning the loss that they may judge of their obligation to pay it. Hence it has been held, where the abandonment expressed the cause of the loss, the insured must be confined to that which was assigned to the insurers as the cause of the abandonment.³ In the case referred to, the court held that there

Mar. Ins. Co., 11 Pick. 162, it was held, in an action against underwriters to recover for an alleged sea damage to bales of blankets bought of the manufacturer in Great Britain and imported into this country, where the defence was that the damage arose in the manufacture or packing of the blankets; and evidence was offered to prove that the damage was of a peculiar kind, and different from salt-water damage; and that other bales of blankets, made by the same manufacturer and imported in other vessels in the same year, had sustained damage of a like nature; that this evidence was admissible.

¹ *Ross v. Hunter*, 4 T. R. 33.

² *Rankin v. Am. Ins. Co.*, 1 Hall, 619. In this case, which was an action on a policy of insurance, where the claim was for damage sustained by the perils of the sea; and, on the arrival of the goods at New York, they were landed before the wardens of the port had held a survey upon them; the defendants were not allowed to prove, either as an objection to the prelimi-

nary proofs, or in bar of the action, that, "by the usage of trade in the port of New York, the master of the vessel is responsible for damages sustained by goods delivered by him to the owner or consignee, unless there has been an actual survey on board the vessel by the port wardens, by which it shall have been found that the goods were properly stowed and were damaged on the voyage by the perils of the sea; and that by a similar usage, as between insurers and assured, the survey so made is a document indispensable to be produced in order to charge the underwriters, and that the preliminary proof is deemed insufficient unless such document is exhibited as a part of it." A similar point, viz. on the neglect, omission, or refusal of the master to make a survey, being a bar to the insured recovering his average loss, was included in the case of *Bentaloe v. Pratt, Wallace*, C. C. 60.

³ *Craig v. United Ins. Co.*, 6 Johns. 226. The case was as follows: A vessel was insured from New York to Bar-

was no variance between the proof and the abandonment, nor are we aware of any case in which the insured was limited in his proof on any such ground. It is usual for the insured to exhibit to the insurers the protest and survey, if they have been made, and any consular or other certificates, and the log-book also, if this bears upon the question of loss. It must be remembered, however, that none of these documents are admissible as evidence, unless they are authenticated by oath.¹ There is some exception to this in the case of an American consul. Statutes of the United States impose upon him certain duties and give to him certain powers. His certificate, under his official seal, of any official act done by him under these statutes might be received as evidence.² It is not often, however, that such acts are important in cases of insurance. Beyond this his certificate requires authentication. A

celona; was boarded by a British cruiser, and warned not to enter any of the ports of France, Spain, Holland, Denmark, Italy, &c. The master, fearing he should be liable to British capture if he proceeded to Barcelona without first touching at a British port, put into Gibraltar for advice, and there obtained permission to proceed on his voyage; but hearing of the Milan decree and the Spanish, and that Barcelona was occupied by French troops, he abandoned the voyage. *Kent*, Ch. J., says: "The preliminary proof consisted of an affidavit of two of the plaintiffs, as to the interest, and of three letters of the captain, which contained the information of the warning given by a British cruiser, of the orders in council, of the cause of going into Gibraltar, and the subsequent leave to depart, and of the existence of the French and Spanish decrees. When the captain afterwards, in his deposition, assigns as the reason for breaking up the voyage the apprehension of capture in going from Gibraltar to Barcelona, the danger must have been understood to arise from those decrees authorizing the capture.

The variance was not essential in substance, but, if there be any variance, the party must undoubtedly be confined to that which was assigned to the defendants as the justifiable cause of abandonment."

¹ In *Drake v. Marryat*, 1 B. & C. 473, the certificate of an underwriter's agent, resident abroad, was not admissible to prove the amount of the damage sustained by the goods.

² For English laws, however, see *Waldron v. Coombe*, 3 Taunt. 162. Per *Mansfield*, Ch. J.: "There is no rule in the English law which makes the certificate of a vice-consul evidence." In *Catlett and Kieth v. Pacific Insurance Co.*, 1 Paine, C. C. 594, it is held, that the certificate of the American consul is not sufficient to authenticate the record of condemnation of a vessel in a court of vice-admiralty. *Thompson*, J., says: "The law of nations recognizes him (consul) only in commercial transactions, but not as clothed with any authority to authenticate judicial proceedings." In *Church v. Hubbard*, 2 Cranch, 187, Mr. Ch. J. *Marshall*, says: "Consuls do not appear to be intrusted

seal is an ancient instrument of authentication, and sometimes has great force. The great seal of a state requires no proof within that state.¹ The seal of a foreign state or a foreign court has been received as proving itself;² the general rule, however, is that such a seal must be proved.³ The Constitution of the United States provides that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and that Congress may by general laws prescribe the manner in which such things shall be proved, and the effect thereof. And in execution of this power, the act of Congress of 1790, chapter 37, makes such provision.⁴ This, however, has no

with the power of authenticating the laws of foreign nations." See also *Vandervoort v. Smith*, 2 Caines, 155, where *Thompson, J.*, says: "The translation, by a consul, not on oath, of a Portuguese document, can have no greater validity than that of any other respectable man."

¹ *Lincoln v. Battelle*, 6 Wend. 475, in which it is decided that the public seal of a state, affixed to the exemplification of a law or judicial proceeding, proves itself. *United States v. Johns*, 4 Dallas, 416. In this case the court say, that "the seal to the acts of legislatures is, in itself, the highest test of authenticity." In *Henry v. Adey*, 3 East, *222, n., it is said: "The public seal of a state is recognized by the law of nations, and presumed to be known to the courts of all other states by whom the law of nations is acknowledged. It is in itself the highest test of authenticity."

² Anonymous, 9 Modern, *66. An exemplification of a sentence in Holland, under the common seal of The States, was admitted to show merely that the plaintiff had suffered there. No demand was founded upon it, and the case was proved *entirely* upon other evidence.

³ *Vandervoort v. Smith*, 2 Caines,

155, where it was held that a copy of the proceedings in a foreign tribunal, certified under the seal at arms of a foreign minister of the kingdom in which the tribunal exists, is not even *prima facie* evidence, unless it be made to appear that such minister has the official custody of such proceedings. In *Church v. Hubbard*, 2 Cranch, 187, Mr. Ch. J. *Marshall*, says: "Foreign laws are well understood to be facts which must, like other facts, be proved to exist before they can be received in a court of justice. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual." See also the opinion of *Parker, C. J.*, in case of *Raynham v. Canton*, 3 Pick. 296, 297; *Gardere v. Columbian Ins. Co.*, 7 Johns, 514.

⁴ The statute referred to in the text is entitled "An Act to prescribe the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated so as to take effect in every other State," and is as follows: "Be it enacted, by the Senate and House of Representatives of the United States of America in Congress assembled; that the acts of the legislatures of the several States shall

effect upon the records of foreign courts. Our notes will show what has been held necessary for the authentication of such records in England and in this country.¹ If a judgment is of-

be authenticated by having the seal of their respective States affixed thereto; that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken. The following are some of the cases arising under the above statute: In *Ferguson v. Harwood*, 7 Cranch, 408, Mr. J. *Story* held, that if a clerk of a court certify at the foot of a paper purporting to be a record, "that the foregoing is truly taken from the record of the proceedings" of his court, and if the judge, chief justice, or presiding magistrate certify that such attestation of the clerk is in due form of law, it is to be presumed that the paper so certified is a full copy of all the proceedings in the case, and is admissible as evidence. But if the writing purports to be a mere transcript of minutes extracted from the docket of the court, it is not admissible as evidence. So in *Drummond v. Magruder*, 9 Cranch, 122, it was held, that a copy of a deed from the clerk of the court, without the certificate of the presiding judge that the attestation of the clerk is in due form, cannot be re-

ceived as evidence in a suit in equity. In *Baker v. Field*, 2 Yeates, 532, it was decided that the copy of the records of a court of Georgia, not having a seal and not certified according to the act of Congress of 26th May, 1790, might be received as *prima facie* evidence, but not as conclusive. In *Ellmore v. Mills*, 1 Haywood, 359, the plaintiff offered to produce a registered copy of a deed, certified by the clerk of a county court in Virginia, and the governor had certified that he was the clerk of that court. The court say: "This is well certified, though not in the mode prescribed by the act of Congress; that act is only affirmative, and does not abolish such modes of authentication as were used here before it passed, and this was the usual mode before that act."

¹ In *Aloes v. Bunbury*, 4 Campb. 28, Lord *Ellenborough* held that, in an action on a foreign judgment, the judgment produced at the trial must be authenticated by the seal of the foreign court, or evidence must be given that the court has no seal; and then the judgment may be established by proving the signature of the judge. The same judge held, in *Buchanan v. Rucker*, 1 Campb. 63, that no action will lie upon a foreign judgment on the face of which it appears that the defendant, not resident within the jurisdiction of the foreign court, was neither served with process, nor came in to defend the action, although such judgment may have been obtained according to the course and practice of the court in similar cases. It appeared in *Cavan v. Stewart*, 1 Stark. 525 (which was an action on a

ferred in evidence, it must not only be duly authenticated, but it must either appear from the record itself, or be shown by proof,

foreign judgment), that the foreign court had a seal which was so much worn as to be incapable of making any impression; but that it was still occasionally used for the purpose of sealing writs of execution and for other purposes, but that it had never been used for the attestation or exemplification of judgments. Lord *Ellenborough* said: "Since it appears that there is a seal of the court, it is necessary that the judgments of the court should be authenticated under that seal, and a mere certificate without the seal is inadmissible. If the seal had been so worn as to be no longer capable of making an impression, another ought to have been procured; till then, as the seal of the court, it ought to have been used." It was held also in the same case that a party is not bound by a foreign judgment, unless it either appear that he was summoned, or it be proved that he was once resident within the jurisdiction; and it is not sufficient that on the face of the proceedings he is described to be an absentee. In *Appleton v. Lord Braybrook*, 6 Maule & Selw. 84, which was an action on two judgments recovered in the Supreme Court of Jamaica, copies of the judgments purporting to be signed by the clerk of the court, and certified by him to be true copies, accompanied by a certificate of a notary public of his being clerk of the said court, and by another certificate of the governor, under the seal of the island, that the person certifying was a notary public, were held inadmissible evidence to prove the judgments. See also the case of *Appleton v. Lord Braybrook* (cited above), reported again in 2 Stark. 7; *Henry v. Adey*, 3 East,

221. This was also an action on a foreign judgment, and it was insufficient to prove the judge's handwriting subscribed to it, without proving the seal affixed thereto is the seal of the court. This case is also reported in 4 Esp. 228. *Catlett & Keith v. Pacific Ins. Co.*, 1 Paine, 594. Here admiralty proceedings of the court in the Isle of France, purporting to be under the seal of the court, certified by the register, and accompanied by a certificate of the American consul, under his seal of office that he was such register, were offered. *Thompson, J.*, says: "These proceedings are not so authenticated as to entitle them to be read in evidence. The seal does not prove itself. There is no impression from which any conclusion can be drawn that it is the seal of that or of any other court. And some proof *aliunde* is always required, either that it is the seal of the court by a witness who knows the fact, or by proof of the handwriting of the judge or the clerk, or by an examined copy, compared with the original in the proper office, or some other evidences of a similar character. They do not alone, unaided by extrinsic evidence, carry with them that verity as to make them evidence in foreign courts." *Talcott v. Delaware Ins. Co.*, 2 Wash. C. C. 449. The copy of a record of the condemnation, in the Superior Court at Havana, of property insured, was offered in evidence, without the seal of the officer who made out the copy; but there were on the margin of each page flourishes with the pen. No proof was given that the officer had or had not a seal. The court rejected the evidence. In *Thompson v. Stewart*, 3 Conn. 171, the record of a decree of the

that the court had jurisdiction over the subject-matter and the question, and authority to enter up the judgment.¹ By the fact of giving the judgment the court may be considered as asserting its jurisdiction; and this assertion will have more or less weight, or, in other words, this question of jurisdiction will be more or less fully examined, in accordance with the character of the case. If the jurisdiction is determined by the laws or regulations of the foreign country in which the judgment is rendered, this assertion of the court will have very great weight; less, however, if the question arises under international laws which courts of all nations are equally competent to inquire into.² In our note we

Court of Vice-Admiralty in Bermuda, purporting to be certified by the deputy registrar, under the seal of the court, was offered in evidence, with no other proof of authenticity, and was held to be admissible.

¹ In *Rose v. Himely*, 4 Cranch, 269, Marshall, C. J., states the general rule as follows: "Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence." He then cites *The Flad Oyen*, 1 Rob. 114; *The Christopher*, 2 Rob. 173; *The Kierlighett*, 3 Rob. 82;

The Helena, 4 Rob. 3. He then sums up as follows: "It is apparent, that the courts of that country hold themselves warranted in examining the jurisdiction of a foreign court, by which a sentence of condemnation has passed, not only in relation to the constitutional powers of the court, but also in relation to the situation of the thing on which those powers are exercised, — at least, so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations and by treaties. There is no reason to suppose that the tribunals of any other country whatever deny themselves the same power. It is, therefore, at present considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern." So, in *Snell v. Faussatt*, 1 Wash. C. C. 271, it is decided that, where the constitution of a foreign court is known, it is proper for the court here to examine into it. See further, to the same effect, *The Comet*, 5 Rob. 255; *The Henrick & Maria*, 4 Rob. 35; *Oddy v. Bovil*, 2 East, 473.

² In *Rose v. Himely*, 4 Cranch, 241, it is decided that, if the sentence of a foreign court cannot, consistently with the law of nations, exercise the jurisdiction which it has assumed, its sen-

give some cases in which this question of jurisdiction has been considered. All courts require, in order that a judgment may be valid, that the parties to the case shall have had sufficient notice and opportunity to appear and protect their interests.¹ But where it is clear that the court had competent jurisdiction, that a question was distinctly before it, and that the parties had an opportunity for a full trial of it, such a judgment has been held conclusive upon the

tence is to be disregarded; but of their own jurisdiction, so far as it depends upon municipal laws, the courts of every country are the exclusive judges. In *Hudson v. Guestier*, 4 Cranch, 293, it is decided that the trial of a municipal seizure must be regulated exclusively by municipal law. No foreign court can question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice. In *Cucullu v. La. Ins. Co.*, 5 Martin (N. S.), 464, it is held that, in an action between the insurer and insured, the court may examine whether the tribunal which condemned was rightfully constituted by the law of nations. *Donaldson v. Thompson*, 1 Campb. 429, decided that the sentence of a court of admiralty, sitting under a commission from a belligerent power, in a neutral country, could not be recognized in English courts. Same doctrine enforced by *Kent*, Ch. J., in case of *Wheelwright v. Depeyster*, 1 Johns. 481-485. In the case of *The Henrick & Maria*, 4 Rob. 35, the right to inquire whether the situation of the thing (in a neutral port), the *locus in quo*, did not take it out of the jurisdiction of the court of the captor of the vessel, was considered as unquestionable.

¹ *The Mary*, 9 Cranch, 144. *Marshall*, Ch. J., says: "Notice of the controversy is necessary in order to become a party, and it is a principle of natural

justice, of universal obligation, that, before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself. No reason is discerned why the sentence of a court of admiralty (in this case) should not be re-examinable in a court of admiralty."

The case of *Buchanan v. Rucker*, 9 East, 191, illustrates the same point. It decides that the law will not raise an assumpsit upon a judgment obtained by default, in one of the colonies, against a party who, upon the face of the proceedings, appeared only to have been summoned "by nailing up a copy of the declaration at the court-house door," especially as he was not subject to the jurisdiction of the court at the time the suit commenced or afterwards.

In *Sawyer v. Me. F. & M. Ins. Co.*, 12 Mass. *291, it was held that a decree of a court of admiralty in the island of Hayti, not founded upon a libel, and in which no trial was had, is not conclusive evidence of the fact of a breach of the blockade, which was the assigned cause of the sentence. *Parker*, Ch. J., says: "It does not appear that any libel was filed, any monition issued, any hearing had, or that any of those formalities had taken place which are necessary to give

parties to it quite uniformly from early ages.¹ It has been held that there is no difference in this respect between a foreign and a domestic judgment; it may be, however, that the essentials necessary to give this validity to a foreign judgment would require stricter or fuller proof than if it were a domestic judgment; but

a conclusive operation to decrees of foreign courts." See also *Shumway v. Stillman*, 6 Wend. 447; *Phillips v. Hunter*, 2 H. Bl. 409.

¹ *Blackham's case*, 1 Sack. 290, decides that the sentence of the Spiritual Court, in a cause within their jurisdiction, is conclusive evidence in the point tried. In *Duchess of Kingston's case*, 20 Howells's St. Tr. 538, Lord Ch. J. *Grey* states, "that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive between the same parties, upon the same matter, directly in question in another court; and that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose." In *Broom's case*, 1 Salk. 32, it is decided, where admiralty has jurisdiction, its sentence binds the party, and "common-law courts must take it according to its determination, which cannot be gainsaid till it be repealed upon an appeal."

In *Le Caux v. Eden*, Doug. 594, the judgment of a prize court was regarded as conclusive, and it was held that an action could not be maintained at common law for an imprisonment on a capture at sea as prize. In *Tarleton v. Tarleton*, 4 M. & S. 20, Lord *Ellenborough* held foreign judgments conclusive. So in *Burrows v. Jemino*, Str. 733, the leading and very early case of *Green v. Waller*, 2 Ld. Ray. 893, decided that

the exemplification of a sentence in the admiralty is conclusive evidence of the point decided by the sentence. In *Evereth v. Hannam*, 6 Taunt. *375, which was an action on a policy of insurance, the sentence of condemnation of the ship was admitted. From the time of these cases to that of *The Mary*, 9 Cranch, 126, and *Rapage v. Amory*, 2 Dallas, 51 (both substantiating the same point), we have almost a uniformity of decision as to the conclusiveness of judgments on the parties.

In New York, in the case of *Ocean Ins. Co. v. Francis*, 2 Wend. 64, it is held that the sentence of admiralty courts of a foreign nation, condemning property as good and lawful prize, according to the law of nations, is *conclusive* to change the property. We will give in brief a few of the more important insurance cases in which this question of the conclusiveness of judgments is considered. In *Vandenheuevel v. U. S. Ins. Co.*, 2 Johns. Ca. 127, it was held that, in an action on a policy of insurance, containing a warranty of American property, the sentence of a foreign court of admiralty, condemning the property as lawful prize, was conclusive evidence as to the character of the property, and of the breach of the warranty.

Precisely the same point was adjudged in the case of *Ludlow v. Dale*, 1 Johns. Ca. 16. So in *Baxter v. N. E. Ins. Co.*, 6 Mass. *277, it was decided, that, in an action on a policy of insurance, the sentence of a foreign court of vice-admiralty is conclusive evidence of the fact of

cases of much authority consider foreign judgments only *prima facie* evidence, and this of no great weight,¹ and there has been a similar conflict upon the question, whether, if the judgment itself be established beyond objection, the grounds upon which it rested can be inferred from the record, or presumed as matter of law, or must be proved.² On this last point we should say that the American courts, and perhaps the English courts, make this distinction between a foreign and a domestic judgment, permitting this inference or presumption in the case of a domestic judgment,

breach of blockade by the ship in question, condemned by its order. The court decide, in *Calhoun v. Ins. Co. Penn.*, 1 Bin. 293, which was an action on a policy of insurance, that the decree of an admiralty binds the property forever, and is conclusive upon the warranty of neutrality. In *Dempsey v. Ins. Co. Penn.*, 1 Bin. 299, n., it was decided that "the sentence of a foreign court of admiralty, condemning property as prize, is conclusive, not only as to its direct effects, but also as to the facts directly decided by it." *Williams v. Armroyd*, 7 Cranch, 423, decides that a sentence of a foreign tribunal at Guadaloupe, condemning neutral property under an edict (Milan decree) unjust in itself, contrary to the law of nations, and in violation of neutral rights, changes the property of the thing condemned. See also *Marshall v. Parker*, 2 Campb. 69; *Cheriot v. Foussat*, 3 Bin. 220; *Pollard v. Bell*, 8 T. R. 434; *Baring v. Clagget*, 3 B. & P. 201.

¹ *Kemble v. Rhinelander*, 3 Johns. Ca. 130, was an action on a policy of insurance. The vessel was captured and condemned on the ground of a circuitous trade between Surinam and Amsterdam. This case held that, the decision of the Admiralty Court not being conclusive, there was not sufficient evidence to warrant the condemnation, and that the insured were entitled to

recover for a total loss. In *N. Y. Firemen's Ins. Co. v. De Wolf*, 2 Cowen, 57, it is settled that the sentence of condemnation of a foreign court of admiralty is not conclusive, but only *prima facie* evidence of the facts upon which it purports to have been founded. So in *Johnston v. Ludlow*, 2 Johns. Ca. 481, and *Goix v. Low*, Ib. 480, it was held that a sentence of a court of admiralty is only *prima facie* evidence of any fact. See also *Robinson v. Jones*, 8 Mass. 536; *Smith v. Williams*, 2 Caines, Ca. in Error, 117.

² The cases in the affirmative of the proposition that a sentence is conclusive of the grounds have been cited and commented on *ante*, p. 527, n. 1. We may however, add *Dalglish v. Hodgson*, 7 Bing. 495. On the contrary see *Fisher v. Ogle*, 1 Campb. 418, where Lord *Ellenborough* held the sentence of a foreign court of admiralty evidence only of what it positively and specifically affirms, and not of what may be inferred from it. *Maley v. Shattuck*, 3 Cranch, 458. A foreign sentence of condemnation is not conclusive evidence that the legal title to the property was not in a subject of a neutral nation. See also *Vasse v. Ball*, 2 Dal. 270. It is held in *Williamson v. Tunno*, 1 Brev. 151, that a sentence of condemnation by a foreign court of admiralty, which appears on the face of the pro-

but refusing it if the judgment be foreign.¹ The cases, however, cannot easily be reconciled.

We have already said that all documents need authentication by oath, as a general rule, when they are offered by the insured as his evidence. Thus it is the duty of the master to keep a log-book, and to enter into it every material incident of the voyage. And it is regarded by maritime law as a record of much importance.² So it is his duty to make a protest in due form if an important damage occurs to the ship.³ So it is his duty to

ceedings to have been founded on facts which do not warrant the judgment, is not conclusive of the legality of the condemnation in a question between the insured and underwriters.

¹ Chancellor *Walworth*, in *Wright v. Butler*, 6 Wend. 284, says of a domestic judgment: "Where a party has no opportunity to plead it as an estoppel, the record may be given in evidence, and is conclusive and binding on the parties, the court, and the jury as to every fact decided." *Gardner v. Buckbee*, 3 Cowen, 120, and English cases there cited, and in 6 Wend. *supra*.

² The log-book of a party is not admissible in his own favor as a general rule. *Sociedale Feliz*, 1 W. Rob. 303, 311. But the log-book of a convoy ship was admitted in *D'Israeli v. Jowett*, 1 Esp. 427, to show the time of the fleet's sailing. In *Watson v. King*, 4 Campb. 272, the log-book of a convoy ship was admitted without objection to prove that the ship parted company during a storm. See also *L'Etoile*, 2 Dods. 106; *The Eleanor*, Edw. Adm. 135.

³ A protest, though a very important document, was held inadmissible in chief by Lord *Kenyon*, in *Christian v. Coombe*, 2 Esp. 489, though his Lordship thought it might be read to contradict the testimony of those who signed it. *Washington, J.*, in *Ruan v. Gard-*

ner, 1 Wash. C. C. 145, allowed the protest of a sailor to be proper for the purpose of showing a compliance with the policy of insurance, which contained a clause that payment was to be made within thirty days after proof made of loss; but the facts stated in the protest are not evidence to prove the loss. See also *Ship Betsey*, *Haggard*, 28; *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7. So in *Senat v. Porter*, 7 T. R. 158, the insured's agent showed to the underwriter the captain's protest containing an account of the loss of the ship insured; this did not entitle the defendant, the underwriter, to read the protest in evidence in an action on the policy. See, however, *Campbell v. Wilkinson*, 2 Bays, 239, where it was held that the protest of the master and mariners is good evidence of tempestuous weather, and also of the capture of the ship. It may be discredited by evidence of inconsistent declarations on the part of those who signed it. *Church v. Teasdale*, 1 Brev. 255.

In Pennsylvania, in an early case, *Nixon v. Long*, 1 Dall. 6, where an action of covenant was brought by the owners of a vessel against the charterers, a protest was admitted in evidence. It must be completed within twenty-four hours after the ship's arrival. *Fleming v. Marine Ins. Co.*, 3 W. & S. 144.

cause a survey to be made, and this in the manner which usage prescribes.¹ All these things he does as the agent of his owner ; and if the owner offers them in evidence to support his claims, they must be verified under oath. But if the insurers call for them, they must be furnished, or their absence accounted for ; and the insurers may make use of them as they stand in their defence. We believe this to be the general rule on this subject, but our notes will show that there is some diversity of practice as of decision.²

The agreements or admissions of parties are often of great importance. If not made by the party himself, he cannot be bound by them unless it is shown that he authorized them.³ But the admissions of those for whose benefit an action is brought by one nominally insured, if they are actually interested in the policy itself, may be shown against them.⁴ It is a common rule that where an assignee of a chose in action brings his action, of necessity, in the name of the assignor, his equities are protected, that is, neither the acts, agreements, nor the admissions of the assignor, made after the assignment, are permitted to affect the assignee. A similar rule is applied to actions on a policy, by a nominally insured, for the benefit of those who are actually interested. While their admissions may be used against them, his

¹ The survey, being an *ex parte* proceeding, is, of course, not admissible for the insured ; and it has been held that the insurers are not entitled, generally, to call for it. *Mitchell v. N. E. Marine Ins. Co.*, 6 Pick. 117. But in *Abbott v. Sebor*, 3 Johns. Ca. 39, a survey, consequent upon proceedings in an admiralty court, was held to be inadmissible. In *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick. 249, a survey was held not conclusive evidence of the necessity of the sale of a ship. See also *Orrok v. Com. Ins. Co.*, 21 Pick. 456. If the survey is called for by the insurers, and they put it into the case for a particular purpose, the insured may then make use of it. The court, in *Saltus v. Com. Ins. Co.*, 10 Johns. 487, say : " The survey was not evidence, on the part of

the plaintiffs, unless called for by the defendants. It is altogether an *ex parte* document." See, on the same topic, *Watson v. Ins. Co. of N. A.*, 2 Wash. C. C. 480 ; *Robinson v. Clifford*, 2 Wash. C. C. 1 ; *Wright v. Barnard*, 2 Esp. 700.

² See the four preceding notes.

³ *Dawes v. N. R. Ins. Co.*, 7 Cowen, 462. Here, by the act of incorporation, the president was not clothed with any power to settle or pay claims, without one third of the directors. An act done by him outside his authority, in this particular, was not binding on the company.

⁴ *Bell v. Ansley*, 16 East, 141. Here the admission was, that the insurance was for *all*, and not for one, as the policy averred, and the variance was held fatal.

admissions, generally speaking, cannot be.¹ If the insurers are willing to pay a certain amount, they may offer this by way of compromise and not prejudice their defence, as the law encourages efforts "to buy one's peace." If, however, they pay money into court, this is an acknowledgment that so much of the plaintiff's claim is legally due to them.² Thus it admits that the policy was duly executed for the plaintiff's interest,³ and that it attached to the property insured,⁴ and consequently it admits that all condi-

¹ Thus, in *Skaife v. Jackson*, 3 B. & C. 422, two trustees brought an action of assumpsit, for money had and received to their use. The defendant produced a receipt for the money, but the plaintiffs were allowed to show that it was fraudulent. So of a release. *Jones v. Herbert*, 7 Taunt. 421. See also *Legh v. Legh*, 1 B. & P. 447.

Frear v. Evartson, 20 Johns. 142. The court say: "Having assigned his interest in the chose in action, Frear could not impair that interest by any confessions, made by him, to the prejudice of his assignee." See, to the same effect, *Raymond v. Squire*, 11 Johns. 47; *Andrews v. Beecker*, 1 Johns. Ca. 411, n. But Lord *Ellenborough*, in *Bell v. Ansley*, 16 East, 141, which was an action on a policy averring the interest to be in one, where, in reality, he was only jointly interested, says: "The parties interested are so far looked upon as parties to the suit, that the declarations of any of them are received as admissible, in evidence, against the plaintiff; and what would be a defence against them is, in many instances, a defence against the plaintiff." *Gibson v. Winter*, 5 B. & Adol. 96. Where a broker, in whose name a policy was effected, brought an action, and the defendants pleaded that they had paid the amount to the broker, by allowing him credit for premiums due to them from him, it was held that, although this was not a good payment as between insurer

and insured, yet it was between the plaintiff on the record and the defendants. See generally *Hackett v. Martin*, 8 Greenl. 77, and cases cited.

² *Stafford v. Clark*, 2 Bing. 377. Payment of money into court on several general counts, one of which is applicable to the plaintiff's demand, admits a cause of action on that. In *Long v. Greville*, 2 B. & C. 19, the court say: "In no case has the effect of payment of money into court gone beyond admitting that the sum paid in is due."

The rule was originally different, as shown by the statement of Sir *James Mansfield*, in the case of *Rucker v. Palsgrave*, 1 Campb. 557: "I remember the time when paying money into court was not an admission of anything. Lord *Mansfield* afterwards held that it admitted the contract stated in the counts on which it was paid." In this case, the payment admitted the fact of capture, but not of total loss. *Evereth v. Bell*, 7 Taunt. 450. Here the doctrine was, that the payment admitted every cause of action. In *Cox v. Parry*, 1 T. R. 464, *Ashurst, J.*, says: "It admits that the plaintiffs have a right of action in the policy to the amount of that sum."

³ *Bell v. Ansley*, 16 East, 141. In this case a decision of *Lee, C. J.*, is cited, where he held that the payment of £50 into court by the insured was proof of his interest to that value.

⁴ In *Andrews v. Palsgrave*, 9 East, 325, it was held that a payment into

tions precedent were complied with, as, for example, sea-worthiness.¹ But it does not admit the totality of the interest asserted, nor of the loss,² nor of any special facts stated, as stranding,³ which are not necessary to make the claim in part a legal one. If the insured makes a settlement with one insurer, this is not evidence against him in a suit against other insurers, even if they be on the same policy.⁴ Nor will a statement of facts by him, for reference of the court under one policy, operate as an admission by him in a suit upon another.⁵

Admissions by insurers may affect them by a waiver or estoppel ; as if the insured when applying for insurance, in describing their vessel, stated accurately a defect, and asked whether this would constitute unseaworthiness, and were answered, certainly not ; we should say that the insurers could not afterwards defend against a claim on the ground that this very defect constituted unseaworthiness. The question might be more difficult if the conversation referred to an express warranty, because it would be easy to strike this out ; and, if it were retained, the common rule, that a written contract must not be varied by parol testimony, would apply. And it has been held that a mere knowledge, on the part of the insurers,

court on an action on a policy was an admission of the contract stated in the count.

¹ *Harrison v. Douglas*, 3 Nott & McCord, 180, sustains the admission of sea-worthiness.

² *Rucker v. Palsgrave*, 1 Campb. 557, *supra*, p. 531, n. 2.

³ *Evereth v. Bell*, 7 Taunt. 450. The plaintiff averred that the ship was stranded, bulged, damaged, and wrecked. Defendant paid money into court generally. Held that the plaintiff could not apply the payment as an admission of total loss, or of the stranding, because the loss might accrue by other causes in the declaration.

⁴ *Trenholm v. Alexander*, 2 Brev. 238. In an action on a policy of insurance, where other underwriters had compounded with the same plaintiff, and his award of 67 $\frac{1}{10}$ per cent was in-

dorsed on the policy, it was held not to be evidence for the jury.

⁵ *Elting v. Scott*, 2 Johns. 157. It was here held that a case made between the insurers and insured, in an action on a policy of insurance, will not be received in evidence in another suit, though it relate to the same subject or policy. *Kent*, Ch. J., in delivering the opinion of the court, remarks: "These cases, often drawn by counsel without any communication with the parties, and with a view to bring before the court some particular point, ought not, perhaps, in any case to be admitted." *Am. Ins. Co. v. Insley*, 7 Penn. St. 223. An affidavit by A, that he had no other insurance on his half of the vessel, and that B's half was separately insured, was held not to be a disclaimer by A of his interest under another policy, insuring his and B's interest.

of a breach of an express warranty, cannot be used as a waiver by them of their right to rest on this breach in their defence.¹

The burden of proof is often of great importance; there may be an almost total absence of evidence on some important points, and then the party on whom the law casts the burden of proof must fail. But while the law unquestionably lays upon the plaintiff the burden of proving all material allegations,² the law of insurance helps him by its presumptions on many points. Thus, if a vessel be not heard from for a long time, and beyond this there is no evidence bearing on the time, place, cause, or manner of the loss, the law will presume, after a sufficient period, that she is lost, and it is said that it further presumes that she was lost by the perils of the seas.³ We should say, however, that this was a question of fact, and that, generally at least, it would be submitted to the jury, under the instructions of the court.

If the ship was insured especially against a part only of the perils of the sea, we know not how mere lapse of time could raise a presumption that she was lost by those special perils. Almost always there would be some evidence bearing on the question, as her age, character, and condition, or the weather, if it could be ascertained what that was at the place where she might have been. While no such facts might be decisive, they would be admissible as evidence, and should have the influence due to them. The practice undoubtedly is to consider a vessel insured under a common policy, when she has not been heard from for a sufficient time, as lost under that policy.

If the policy itself ends at a certain time, or is terminated by

¹ *Kennedy v. St. Lawrence Co. Mutual Ins. Co.*, 10 Barb. 285. The court say: "The rule which prevails upon sales of property — that a warranty does not extend to defects which are known to the purchaser — does not apply to warranties contained in contracts of insurance." He cites *Jennings v. The Chenango Co. Mutual Ins. Co.*, 2 Denio, 75, and other New York and Massachusetts cases.

² *De Bolle v. Penn. Ins. Co.*, 4 Whart. 68; *Bridges v. Niagara Ins. Co.*, 1 Hall, 247.

³ *Watson v. King*, 1 Stark. 121, Lord *Ellenborough* here held, that if there is proof of a vessel having sailed, and she is not heard from for two or three years, it is to be presumed that she is lost. The court say, in *Du Peyre v. Western M. & F. Ins. Co.*, 2 Rob. (La.) 457: "When a vessel is lost in consequence of some of the perils insured against, the presumption is in favor of her seaworthiness, and it is incumbent on the underwriters to show that this warranty has not been complied with."

deviation or other cause, and goods have been injured by perils of the seas, and may have been so injured either before or after the termination of the risk, this has been held to be a question of fact for the jury.¹ Where a vessel, soon after leaving port, founders without stress of weather, or other adequate cause of injury, the presumption is that the loss arose from some latent defect existing before setting sail, which rendered the vessel unseaworthy.²

The law presumes that all men do their duty, and this rule has been applied to the duty of the master in navigating the vessel.³ So as to concealment, or misrepresentation, if this be charged it must be proved.⁴ Here, however, the law comes in with some presumption on the evidence; thus, if the insurers prove that a certain material fact was known to the insured, and that, had the insurers known it, the premium must have been greater, the burden will now shift, and the insured must prove that he communicated the fact.⁵ And in one English case the court expressed the opinion that very slender evidence of the non-communication of a material fact is all that can be required of a defendant in such cases.⁶ Nothing can be more certain than that insurers are always entitled to all the information possessed

¹ *Hare v. Travis*, 7 B. & C. 14. In this case the goods insured received considerable damage, but it was impossible to tell whether on the first voyage from Liverpool to London, or between the latter place and Southampton; Lord *Tenterden* left it to the jury.

² *Walsh v. Wash. Mar. Ins. Co.*, 32 N. Y. 427.

³ In *Robinson v. The Common. Ins. Co.*, 8 Sumn. 221, Mr. J. *Story*, says: "Now it is a general principle of law, that every man is presumed to do his duty, until the contrary is shown; and, *a fortiori*, this doctrine applies to the perilous responsibility of a master in ordering the sale of his ship." In *Am. Ins. Co. v. Bryan*, 26 Wend. 582, *Verplanck*, Senator, says: "It is a general principle of the common law, that every man is presumed to do his duty until

the contrary is established, and therefore the burden is on the plaintiff to negative this presumption by appropriate proof."

⁴ It was held in *Fiske v. N. E. Ins. Co.*, 15 Pick. 310, that when the time of sailing is a material fact, and concealment of an important fact in reference thereto is charged, the burden of proof is on the defendants to show that it was not communicated.

⁵ *Livingston v. Delafield*, 3 Caines, 49. A vessel which had been out forty-five days between Jamaica and New York was insured without notice being given of such fact. This would materially have changed the risk. Proof must be given of the notice by the insured.

⁶ In *Elkin v. Janson*, 13 M. & W. 655, the defendant (an underwriter) alleged that a material fact had been concealed

by the insured, not only as to making the policy, but afterwards as to the loss, and the interest of the insured and its value. Hence the refusal of the insured to permit an examination, by the insurers, of damaged articles, is evidence from which the jury may infer fraud.¹ This has been held under a fire policy, and it must be equally true of a marine policy.

We have seen, when speaking of valued policies, that excessive valuation may lead to an inference of fraud.² It is a rule very frequently applied in prize cases, that the destruction of papers raises the presumption that they are enemies' property.³ The principle which underlies this and some other of the rules of evidence is, that if a party has the means of exhibiting facts as they are, and refuses to do so, it is a fair and almost necessary presumption that the truth would be adverse to his claims.

Whatever documents are handed to the insurers as preliminary proof they may make use of, but the fact that they receive them, and refuse to pay the loss because of them, does not make them evidence for the plaintiff, on trial, without due authentication.⁴

from him by the insured at the time of insurance. No evidence was given to support it. The court held that "he should have given *some* evidence of it."

¹ N. Y. F. Ins. Co. v. Delavan, 8 Paige's Ch. 419. Per Chancellor *Walworth*: "In case the assured, without any reasonable excuse, refuses to permit a proper scrutiny as to the loss, by an examination of the goods remaining on hand, or otherwise, the insurers will have the full benefit of the presumption of fraud and unfairness in his statement of the loss, before the jury which tries the cause."

² In *Ocean Ins. Co. v. Fields*, 2 Story, C. C. 59, Mr. J. *Story*, p. 77, says: "Overvaluation, I agree, is no necessary proof of fraud; but there may be very cogent circumstances from which fraud may be inferred, where the cause otherwise labors under strong suspicions."

³ *The Pizarro*, 2 Wheat. 227. The court in this case, where the papers were

thrown overboard and no satisfactory explanation given, say: "Concealment, or even spoliation, of papers is a very awakening circumstance, and calculated to excite the vigilance and justify the suspicions of the court. But it is open to explanation, for it may have arisen from accident, necessity, or superior force. If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile, if the cause labor under heavy suspicions, or there be bad faith, or gross prevarication, condemnation ensues from defects in the evidence which the party is not permitted to supply."

⁴ *Thurston v. Murtagh*, 3 Bin. 326. The agent of the insured in this case, when he demanded payment of the loss, lodged with the broker through whom the insurance was effected sundry documents to prove the loss, and among others a writing purporting to be a copy of a decree of the English Court of Ap-

The admissibility of witnesses is governed, in actions upon policies, by the same rules which are applicable in other cases. These vary in different States. In those in which interest disqualifies a witness, it must be an interest in the suit on trial, and not merely an interest in the question. We give in our notes the principal cases in which the interest of a witness has been considered in actions on policies, and those also in which questions have arisen concerning the admissibility of depositions.¹

Newspapers are sometimes offered in evidence. As a general rule, whatever information a newspaper contains must be brought

peals in admiralty cases, and certified under the seal of the court. It was decided that it ought not to have been admitted. *Flindt v. Atkins*, 3 Campb. 215. It was here held that the copy of a sentence of condemnation of a ship or cargo in a foreign admiralty court is not made admissible evidence for the underwriters by being handed over to them by the assured, along with other papers, to satisfy them of the loss.

¹ *Ridout v. Johnson*, 1 T. R. 303. This case is cited by *Buller, J.*, in the case of *Walton v. Shelley*, 1 T. R. 296. He says it decided that one underwriter, cannot be a witness for another, in cases on policies of insurance. But in *Bent v. Baker*, 3 T. R. 27, it is modified so that "a broker who underwrites a policy of insurance, after getting it underwritten by others, is a competent witness for the defendant in an action against any of those who underwrote before him." See also *Jourdaine v. Lashbrooke*, 7 T. R. 604. *Bilbie v. Lumley*, 2 East, 469. An underwriter who had paid £100 for a loss by capture to the insured was admitted as a witness in an action to show that it had been paid under a mistake. *Forester v. Pigou*, 3 Campb. 380. An underwriter who pays on a promise of repayment, if the policy is proved to be invalid, is not a competent witness for

another underwriter who disputes the loss. *Columbian Ins. Co. v. Lawrence*, 10 Pet. 507. *Story, J.*, says: "We know of no principle of law or of equity by which a mortgagee has the right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged property, in case of a loss by fire." The mortgagee was admitted as a witness. An agent is a competent witness, *ex necessitate*. *Mackay v. Rhineland*, 1 Johns. Ca. 408, and *Bent v. Baker*, *supra*. A stevedore employed by the master of a vessel to stow a cargo is a competent witness to prove that it is properly stowed. *Rankin v. Am. Ins. Co.*, 1 Hall, 619. A pilot is a competent witness in reference to loss, if he was on board at the time. *Vairan v. Canal Ins. Co.*, 10 Ohio, 561. In *Hicks v. Fitzsimmons*, 1 Wash. C. C. 279, the captain of the vessel insured was admitted to prove the loss by capture. It was held in *Bird v. Thompson*, 1 Esp. 339, that a master was not a competent witness to show that barratry was committed by consent and direction of the owners of the vessel. See also *Paradise v. Sun Mut. Ins. Co.*, 6 La. An. 596. In *Am. Ins. Co. v. Insley*, 7 Penn. St. 223, master and mariners were admitted to prove loss. In *Robertson v. French*, 4 Esp. 246, it was held that, in an action on a policy of insurance on

home to the knowledge of the party who is to be affected by it. It has, however, been held that insurers are presumed to know the marine intelligence contained in newspapers which are taken at their place of business,¹ and the presumption would be still stronger of their knowledge of facts written and posted in their office.² The general rule as to the production of papers is, that a party wishing to use a paper in the hands of the adverse party

goods, the supercargo, who was to have had a share in the profits of the adventure, is a good witness where the goods are lost before they were sold. In *Protheroe v. Elton*, cited by *Gibbs*, Ch. J., in 8 Taunt. 457, the ship-owner was not admitted to prove the sea-worthiness of the vessel insured. It was held in *Ruan v. Gardner*, 1 Wash. C. C. 145, that one part owner of a vessel not interested in the insurance is a witness to prove loss, &c., in an action on the policy. See also *Francis v. Ocean Ins. Co.*, 6 Cow. 404.

As to depositions, see *Vandervoort v. Col. Ins. Co.*, 3 Johns. Ca. 137, where, when a motion was made to examine the Portuguese Secretary of State at Lisbon, in an action on a policy of insurance, where the loss happened on the coast of Brazil, the court refused a commission, unless the party could show how the evidence would be material. In *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7, it was held to be no objection to reading a deposition taken abroad, that the witnesses had previously been examined and cross-examined under a commission in the United States. Witnesses must be examined on all the interrogatories. Same case. Also, as to the formality required, see *supra*. If the questions annexed are made without objection, the answers cannot be objected to, if they are pertinent. *Lincoln v. Bartelle*, 6 Wend. 475, decides that the depositions will be received in

evidence, although the oaths to the witnesses were not administered by the commissioners, if it appears they were prohibited from administering them, and they were administered by the local authorities. See too 2 Wash. 7, *supra*; *Taylor v. McVicar*, 6 Esp. 27. Here the depositions, taken in an action on a policy of insurance, of the captain, who is part owner, where the loss is imputed to his conduct, were not admitted as evidence.

¹ *Green v. Merchants' Ins. Co.*, 10 Pick. 402. In an action on a policy of insurance upon a vessel, underwritten by an insurance company, it was proved that a certain newspaper was taken by the defendants; that in the due course of the mail the particular paper containing information of the time of the ship's sailing, which was material to the risk, would have reached them before the policy was underwritten; that this number was afterwards found upon their files; and the president of the company testified that he knew of the intelligence contained in it, though he could not recollect the source of his information. It was held that this number had been rightly admitted in evidence.

² *Bain v. Case*, 3 C. & P. 496; *Freeman v. Baker*, 5 C. & P. 475. In *Child v. Sun Mutual Ins. Co.*, 3 Sandf. S. C. 26. A Honolulu paper, called "The Polynesian," was held not admissible to show the condition of a vessel at the time of her sailing from that port.

gives him notice to produce it on the trial, and, if it be not produced, he may prove the contents. In practice, evidence of the contents which might be considered quite imperfect goes to the jury, and has weight with them, on the ground that it is in the power of the adverse party to rectify any error or supply any deficiency by the production of the paper itself.¹ And sometimes the court has ordered the production of the papers required. And the insured has been permitted to prove a letter of abandonment, without having given notice to the insurers to produce it.² In regard to all such questions, and as to the introduction of copies of papers, and of the admissibility of secondary proof in the absence of primary proof, courts sometimes exercise a wide discretion:

Experts are more often called in insurance cases than in those of any other class, unless it be patent cases. If the question be of navigation, or deviation, or the proper loading of a ship, or the treatment of goods, or sea-worthiness, experts are very frequently called. Of late years resort to them has become much more common than formerly, and, in the judgment of many persons, it has been carried quite too far. It is certainly a part of the law of evidence that no witnesses should express mere opinions to the jury. And it is believed that when experts were first employed, this rule was adhered to; that is to say, experts were men who possessed knowledge of a kind, or amount, which it could not be supposed a jury possessed, and which they ought to have to decide correctly the questions submitted to them. This knowledge the experts gave them. It may be very difficult to draw an exact line between a mere statement of peculiar knowledge and one which is in fact a statement of opinion of the question in the case. But this line is now, in practice, almost disregarded. Suppose, for example, the question to be whether the conduct of the master under certain circumstances

¹ *Lawrence v. Ocean Ins. Co.*, 11 Johns. 241. In a cause on a policy of insurance, the court made an order (as is their custom) for the assured to produce to the insurers, upon affidavit, all papers, or true copies thereof, relative to the matters in issue between the parties; and the insurers were held

entitled to read the whole correspondence and papers produced, pursuant to the order. See *ante*, p. 335.

² *Peyton v. Hallett*, 1 Caines, 363. Parol evidence of a letter of abandonment, though in writing, is admissible, and no notice is necessary to produce the letter.

was judicious or not, as in making or shortening sail, or putting the helm to starboard or port, it is one thing to ask of a witness what a skilful navigator would do under certain supposed circumstances, and to learn the grounds of his conclusion, and another thing to ask whether in his opinion this master did, at this time, right or wrong. If opinions of this kind are sought, experience has shown that it is easy to get them of any kind and in any number, and the jury are then to choose between the opinions offered them, instead of making use of the information given to them.

CHAPTER XI.

JURISDICTION.

ACTIONS on policies are usually brought in courts of common law, and are actions of assumpsit, or whatever actions the code of practice, in the State in which they are brought, substitutes for assumpsit. Courts of equity have also a wide jurisdiction in cases of insurance. Its power to reform a policy has been repeatedly asserted, both in England and in this country. Our notes will show the leading cases on this subject, and they will illustrate the principles by which equity has been governed in granting this relief. We would say, in general, that it cannot be granted unless a previous agreement to which the policy should have conformed and does not conform can be distinctly proved.

If the policy be not in positive contradiction of the agreement, but so ambiguously expressed that the common rules of construction fail to make it conform to the agreement, equity may refer to the agreement. But if, by reasonable construction of the policy, it can be made to be in substantial conformity with the agreement, the policy will not be reformed.¹ If the defence of the insurers

¹ In *Motteux v. London Ass. Co.*, 1 Atk. 545, where, by the label or memorandum of minutes of agreement, a ship was to be insured from the time she arrived at Fort St. George, and by a mistake the policy was made out, by which the insurance commenced *from the departure* of the ship from Fort St. George, it was held that the policy should be made to agree with the label. S. C., 4 Vin. Abr. 281, pl. 10; S. C. 3 Eq. Ca. Abr. 636; *Delavigne v. United Ins. Co.*, 1 Johns. Ca. 310. This was an action for money had and received to recover back the premium which had been paid by plaintiff to the defendants for insuring the brig *Norge* and her cargo,

from St. Thomas to New York. The vessel was described as the "Danish brig called the *Norge*," but there were no other words importing any warranty. In the policy on the cargo there was a written warranty in these words: "Warranted the property of Cassimere Delavigne, a citizen of the United States."

The *Norge* was captured during her voyage, and the vessel and cargo were condemned in the admiralty court at New Providence as being "French property." The plaintiff, insisting that the cargo was his property, and the vessel the property of a naturalized Danish burgher, on the Island of St. Thomas,

rests on the fraud of the insured, either in obtaining the policy or otherwise affecting the claim, this defence may be made at common law.¹ But courts of equity have exercised the power of

submitted the case to arbitrators, who decided that the assured could not recover for the brig and cargo. Nothing, however, was said by the arbitrators in reference to the premium, for which this action was brought. In this action for the premium, *Lewis, J.*, in delivering the opinion of the court, said: "It is admitted as a general principle, that where the policy never attaches, but is void *ab initio*, the premium must be returned, because the contract is without consideration, and the insurer ought not to retain the premium where no risk has been run. But it is insisted that here is a fraud on the insurer, which enhanced the risk, and that therefore the plaintiff ought not to be allowed to maintain an action for a return of premium. If the defendants had sought relief in a court of equity against the policy on the ground of fraud, they would have been obliged, according to the course of that court, to have refunded the premium before any aid would have been afforded them. Whether in a suit on the policy in this court they would not have been held to do the same, and to bring the money into court, it is not necessary now to decide." Judgment was entered for the plaintiff. *Graves v. Mar. Ins. Co.*, 2 Caines, 343; *Hogan v. Del. Ins. Co.*, Condly's *Marshall*, 345, n.; S. C. 1 Wash. C. C. 419. In this case the rule was laid down, that if by mistake a deed is drawn plainly different from the agreement on which it is founded, a court of equity will consider the deed, as if it had conformed to the agreement; or if the deed be ambiguously expressed, it may be explained by the agreement; and if a deed be so expressed as that a reasonable construc-

tion can be given to it, and when so given it does not plainly appear to be at variance with the agreement, the latter is not to be regarded. *Del. Ins. Co. v. Hogan*, 2 Wash. C. C. 4; *Graves v. Boston Mar. Ins. Co.*, 2 Cranch, 419. This was an appeal from the Circuit Court for the district of Massachusetts, on a decree in chancery dismissing the plaintiff's bill; the object of which was to charge the defendants upon a policy of insurance, and to obtain relief against a mistake alleged to have been made by inserting only the name of *Graves* in the policy, whereas the interest of both *Graves* and *Barnewall* was intended to be insured. *Marshall, Ch. J.*, in delivering the opinion of the court, held, that a policy in the name of *one* joint owner, "as property may appear" (without the clause stating the insurance to be for the benefit of all concerned), does not cover the interest of another joint owner; and that the evidence of the knowledge of the underwriters of the intention of the insured, at the time of making the policy, ought to be very clear to justify a court of equity in conforming the policy to that intention. *Dow v. Whetten*, 8 Wend. 160; *Franklin Ins. Co. v. Hewitt*, 3 B. Mon. 239; *Ewer v. Wash. Ins. Co.*, 16 Pick. 502.

¹ *Hoyt v. Gilman*, 8 Mass. 336. This was an action on a policy of insurance, and the judge directed a nonsuit, on the ground that there had been a fraudulent concealment of material facts at the time of effecting the insurance; and the court refused to set aside the nonsuit and grant a new trial, observing that, if the jury had found a verdict for the plaintiff, they should have set the verdict aside.

compelling the insured to surrender a policy which he had obtained by fraud.¹ Equity has interposed to give relief in many other cases, as our notes will show.² Admiralty has jurisdiction

¹ *Whittingham v. Thornburgh*, 2 Vern. 206, Prac. in Chanc. 20, 3 Eq. Ca. Abr. 635. Here, where the defendant procured an underwriter to a policy of life insurance, who stated that he knew the insured, and that he was in good health, and others were induced by this means to underwrite the policy, it appearing on the trial, soon after the death of the insured, that the first underwriter had been merely used as a decoy to influence others to sign, and that his statement as to the health of the insured was false, it was held that the policy of insurance should be delivered up and cancelled, and a perpetual injunction was decreed against the verdict obtained thereon at law, and the plaintiffs were allowed their full costs, both at law and in equity; the money received in premium to go in part of their costs. *Wilson v. Duckett*, 3 Burr. 1361. In *Da Costa v. Scandret*, 2 P. Wms. 170, 3 Eq. Ca. Abr. 636, where a merchant, having a doubtful account of his ship, insured her without acquainting the insurers of the danger she was in, it was held that the insurance was fraudulent; and the court relieved against the policy. See the remarks of Lord *Eldon* in the case of *Lucena v. Craufurd*, 5 B. & P. 322; *Atlantic Ins. Co. v. Jose Maria Lunar*, 1 Sandf. ch. 91; *French v. Connelly*, 2 Anstr. 454. In the case of *Fenn v. Craig*, 3 Younge & Coll. 216, where a policy on the life of the assured was obtained from the plaintiffs by fraudulent representations as to his habits and state of health, the policy was decreed to be delivered up and cancelled.

² In the case of *Motteux v. London*

Ass. Co., 1 Atk. Ch. 545, Lord *Hardwicke* expressed himself of the opinion that equity would compel a trustee to allow his name to be used in a suit at law, for the benefit of his interested *cestui que trust*. In *Leeds v. Mar. Ins. Co.*, 6 Wheaton, 565, equity interposed to order a set-off of the agent's premium notes against a judgment for loss which could not be set off at law. *Scott v. Rosse*, 3 Ir. Ch. 170; *De Ghe-toft v. London Ass. Co.*, Masley, Ch. 83; 4 Brown, Parl. Ca. 436; *Fall v. Chambers*, Masley, Ch. 193. See the case of the *Indiana Mutual Fire Ins. Co. v. Chamberlain*, 8 Blackf. Ind. 150, where a bill in chancery was filed by the plaintiffs against the heirs of C. to subject certain real estate which C. had insured, and which had descended to his heirs, to the payment of the premium note given to the insurance company by C. In *The New York Ins. Co. v. Roulet*, 24 Wendell, 505, where a cargo of merchandise was insured, was seized, and condemned by the French government, and a compromise was subsequently made between the underwriters and the assured, by which the latter accepted from the former \$ 5,000, in satisfaction of their claim against the underwriters, which was for \$ 15,000, and surrendered the policy, but did not assign or call the right to claim indemnity from the French government, it was held, on the underwriters subsequently obtaining \$ 5,000 from the French government, that they held that sum in trust for the assured, and they were decreed to pay over the same. It was also held that, in cases like the above, courts of equity and of law had concurrent juris-

over bottomry and respondentia contracts. There can be no doubt of this when they are actually maritime contracts; but when they assume this form or character, but do not in their substance belong to this class, the jurisdiction of admiralty may be doubted.

Mr. Justice Story held very decidedly, and intimated repeatedly, that admiralty had direct jurisdiction over actions on policies of insurance. ^a In other cases in the First Circuit of United States, this jurisdiction has been affirmed; and it has been recently asserted, or, if not asserted, implied, by Mr. Justice Curtis, an extract from whose decision, which we give in our notes, will show the state of the law on this subject.¹

diction. Equity has jurisdiction to effect a distribution of the assets of an insolvent insurance company. *Blanchard v. Alleghany Mut. Ins. Co.*, 1 Penn. 359; *Caston v. Alleghany County Mut. Ins. Co.*, Ib. 322; *Rhinehart v. Alleghany County Mutual Ins. Co.*, Ib. 359. Also to order a distribution of profits of a joint-stock insurance company. *Scott v. Eagle Fire Company*, 7 Paige, Ch. N. Y. 198. Equity has also jurisdiction to prevent the master of a foreign vessel from selling his cargo, for the purpose of paying his own debts with the proceeds. *Morrison v. Noorman*, *Benecké* (London, ed. 1824, p. 259). In the case of *Hallett v. Dowdall*, 18 Ad. & E. 2, 9 Eng. L. & Eq. 347, a court of equity exercised jurisdiction where an insurance company was liable to a policy holder in its associate capacity, and its individual members were also liable, there being an insufficiency of company funds. See also, in relation to the above branch of jurisdiction, *Burton, ex parte*, 13 Eng. L. & Eq. 435; *India & London Life Ass. Co. v. Dalby*, 4 De Gex & S. Ch. 462, 7 Eng. L. & Eq. 250; *Johnson v. Knight*, 16 Sim. Ch. 509. In *Harrison v. McConkey*, 1 Md. Ch. 34, on a valid assignment of a life-insurance policy to a creditor of the as-

sured, the surplus over and above the amount of the debt on the policy falling due to be paid to the wife of the assured, it was held, that the administrator of the assignor had no claim on the policy, and the court decreed the apportionment and payment of the sum insured between the creditor and the widow of the assignor. In *Chase v. The Washington Mut. Ins. Co.*, 12 Barb. 595, where a policy of insurance, after having been executed, and sent to an agent of the underwriters, to be delivered to the assured, was sent back to the general agent of the insurers for correction, and he destroyed the same — so far as to make its legal vitality doubtful — by tearing off the seals and names of the president and secretary of the insurance company; and when after a loss had occurred, on being requested, he refused to return the policy, it was held that this act of the agent authorized the insured to come into a court of equity for relief against the insurers.

¹ In the case of *The Gloucester Insurance Company v. Younger*, 2 Curtis, C. C. R. 332, Mr. J. Curtis, in giving the opinion, says: "In *Delovio v. Boit*, 2 Gal. R. 398, decided in 1815, Mr Justice Story, after an elaborate and very learned examination of the subject, held that the admiralty jurisdiction

Whenever a court of common law tries a case under a policy, as under any contract or any issue, the court has exclusive juris-

of the District Courts of the United States extended to suits on policies of insurance. In *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27, in the year 1822, the question was again before him. He reaffirmed the jurisdiction, and made a decree for the libellant. An appeal was taken, but for some cause was not prosecuted to a hearing before the Supreme Court. In *Hale v. The Washington Ins. Co.*, 2 Story, 176, in 1842, that learned judge again declared that he adhered to the doctrine of *Delovio v. Boit*, and he again made a decree, in a suit in the admiralty, founded on a policy of insurance. In numerous cases, in this circuit, the doctrines of *Delovio v. Boit* have been still further examined and affirmed. *Andrews v. The Essex F. & M. Ins. Co.*, 3 Mason, 6; *Plummer v. Webb*, 4 Ib. 380; *The Tilton*, 5 Ib. 465; *The Volunteer*, 1 Sum. 551; *The Tribune*, 3 Ib. 144; *The Spartan*, Ware's R. 149; *Steele v. Thacher*, Ib. 91; *The Huntress*, 1 Daves, 93 and note. And, so far as I am informed, the jurisdiction has not been here questioned. On the other hand, it must be admitted that, either from want of confidence felt by the bar in the ultimate establishment of the jurisdiction by the Supreme Court of the United States, or from some other cause, the jurisdiction of the admiralty over policies of insurance has been very infrequently resorted to. It is believed that since *Peele's* case a libel on a policy of insurance has not been filed in this district, where the amount in dispute would allow an appeal.

"Though this question has never come before the Supreme Court of the United States, other inquiries concerning the

extent of the admiralty jurisdiction conferred by the Constitution have there arisen, and given rise to great research and much acute criticism. They have resulted in pretty wide differences of opinion among the individual judges. *Waring v. Clarke*, 5 How. 441; *N. Jersey S. N. Co. v. The Merchants' Bank*, 6 How. 344; *The Genesee Chief*, 12 Ib. 443. In *Cutter v. Rae*, 7 How. 729, it was held by a majority of the court that a libel, *in personam*, would not lie by the owner of a ship, against one of the consignees of cargo, who had received his goods, to recover a sum of money due by way of contribution to a general-average loss. This decision certainly goes pretty far towards overruling the decision in *Delovio v. Boit*, and is undoubtedly irreconcilable with some of the positions which are reported therein. But it does not cover the precise question, whether a policy of insurance is one of those maritime contracts which are within this jurisdiction. It rests on the ground that, after the goods have been surrendered to the consignee, the lien is gone, and therefore there is not admiralty jurisdiction to enforce a lien; and that the promise by the consignee to contribute is implied, if at all, by the common law; that it is not a creature of the admiralty law, and is not to be enforced in a court of admiralty. All this *may* be true, and yet a policy of insurance may be such a maritime contract as comes under the jurisdiction of the admiralty, while an implied promise to contribute in general average does not. Undoubtedly it would be somewhat remarkable if the admiralty were held not to have jurisdiction over an implied promise to

diction of the law, and the jury exclusive jurisdiction of the facts. At the same time it is a common practice for a court to grant a new trial, on the ground that the verdict of the jury is against the evidence. We know no rules which exactly define the degree of difference or opposition between the evidence and the verdict which would induce a court of law to give this relief. Almost every losing party thinks that the verdict is not what it should be; and if there be a too great readiness in the court to hold the verdict untenable from its opposition to the evidence, such a court may have to try over again every important case upon its evidence. At the same time, it is certain that where the jury entirely mistake the force or bearing of the evidence, or wilfully disregard it, the court should exercise that power of setting the verdict aside which it unquestionably possesses. When it happens that the jury pay no attention to the direction of the court in matters of law, there is no reason why this usurpation of power on their part should not be rebuked and corrected, however often it may be repeated. But if it be only a question of

contribute to a general-average loss, but to have jurisdiction over an express promise to do so; or that it had not jurisdiction over an express promise to contribute to such a loss, but had jurisdiction over an express promise, in a policy of insurance, to indemnify one for what he might be obliged to contribute. Still, an inquiry into the extent of the admiralty jurisdiction, under the Constitution of the United States, is, to some extent at least, an historical question; and whether a particular class of contracts is within that jurisdiction is to be determined, not by reasoning *a priori*, but by examining into the actual extent of that jurisdiction, as exercised in this country prior to the formation of the Constitution. This may lead, as, comparing the cases of *New Jersey S. N. Co. v. Merchants' Bank*, and *Cutter v. Rae*, and *The Genesee Chief*, it may, perhaps, be said it has led, to theoretical anomalies, which can scarcely be recon-

ciled, but which may, nevertheless, be sound deductions from correct premises.

"The preliminary question which I have to determine is, whether I ought to examine this subject, and pronounce my own individual opinion thereon; or whether, sitting here, I should allow the question, which has been thus decided by my learned and distinguished predecessor, and which has been so long settled in this circuit, to remain, as he left it, until it shall come before the Supreme Court of the United States. I confess I have felt not a little doubt concerning what my duty requires of me; but I have come to the conclusion, that, sitting here, I shall best discharge my duty by treating the inquiry as to the jurisdiction as not to be further gone into on the circuit, holding myself free to go into it at large, and with all the aids of more recent investigations, when it shall arise in the Appellate Court."

fact, as, for example, it be one of sea-worthiness, the court may yield to the persistent determination of juries, and after repeated verdicts refuse to set one aside.¹ The distinction would seem to be, on this and on other similar questions, that, while the court state to the jury the law of sea-worthiness, and define for them the requisites for sea-worthiness, it belongs to the jury to decide whether that particular ship was sea-worthy.² So if the question be one of representation or concealment, this would seem to be one of mixed law and fact. It is certain that the court should instruct the jury as to what constitutes the materiality of any fact, and then the jury determine whether a material fact was concealed or misrepresented.³ But in practice the jury do frequently decide upon the materiality of a fact, and this may sometimes de-

¹ In the case of *Coffin v. Phoenix Ins. Co.*, 15 Pick. 291, *Shaw*, C. J., held that although it is the province of the jury to decide ultimately on questions of fact, yet it is within the province, and it is sometimes the duty, of the court to set aside a verdict as being contrary to the weight of evidence. There are cases where, by the ordinary forms of proceeding, the issue must go to the jury; but where it depends upon a few facts, which are plainly proved, and stand uncontradicted, and where the rules of law applicable to such facts are plain and well settled, and where, therefore, the verdict must obviously be found one way, or be manifestly wrong, and if in such case the jury persist in finding a wrong verdict, it will be the duty of the court to set it aside, as often as it is returned.

² In *Prescott v. Union Ins. Co.*, 1 Wharton, 399, where the question was as to the sea-worthiness of the vessel, in an action by the insured against the insurer, and, there being no contradictory testimony as to the facts, the judge charged the jury, that "if the facts are as stated in the protest, that the vessel began to leak as soon as she began to

sail, or soon after, and continued to leak up to the time of the storm, or any fortuitous accident, and would, in consequence thereof, have required repairs, although there had been no storm, then the law says she was unseaworthy,"—the court held that the law was correctly laid down to the jury, and that the court was right in not leaving it to the jury to presume sea-worthiness or otherwise.

³ In *Flinn v. Headlam*, 9 Barn. & C. 693, where the agent of a ship-owner, effecting a policy on a ship, misrepresented the nature of the cargo which she was to carry, but this was not inserted in the policy, and it did not appear that the underwriter was induced by the misrepresentation to accept the risk, it was held by Lord Tenterden, Ch. J., that the jury were warranted in finding that the misrepresentation was not material, and that it did not vitiate the policy. *Lyon v. Commercial Ins. Co.*, 2 Rob. La. 266; *Littledale v. Dixon*, 4 B. & P. 151; *Willes v. Glover*, Ib. 14; *Livingstone v. Delafield*, 1 Johns. N. Y. 523. In *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285–299, *Bartol*, J., observed: "It is everywhere conceded that the

pend upon its connection with other facts, the existence of which is disputed and must be determined by the jury. So what degree of necessity authorizes a sale of the ship or of the cargo is matter of law.¹ But whether that necessity existed in fact is a question for the jury. It is not possible to give any rule on the subject, excepting that already given, that it is the office of the court to state whatever principles of law are applicable to the questions before them, leaving to the jury the application of those principles to the evidence in the case.² We have, however, many interesting insurance cases in which the question has arisen as to the bounds which divide the province of the court from the province of the jury, and these cases, which we give in our notes, will illustrate better than anything we can say where this dividing line will be found.³

materiality of the disclosure or concealment is a question of fact which must be submitted to the jury." See also *Mutual Ins. Co. v. Deale*, 18 Md. 26; *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. 624; *Cumberland Valley Mut. Protection Ins. Co. v. Mitchell*, 48 Penn. St. 374; *Richmondville Union Seminary v. Hamilton Mut. Ins. Co.*, 14 Gray, 459; *Clark v. Union Ins. Co.*, 40 N. H. 333; *Hartford Ins. Co. v. Harmer*, 2 Ohio St. 452.

¹ In the case of *Bryant v. Commonwealth Ins. Co.*, 13 Pick. 543, the jury had previously found a verdict, to the effect that where a vessel was stranded on the coast of Virginia, and the master had sold the cargo, he was justified in so doing. The defendants, however, moved for a new trial, and the verdict was not confirmed.

² *Abitbol v. Briston*, 6 Taunton, 464; *Merchants' Ins. Co. of Alexandria v. Tucker*, 3 Cranch, 357; *Milles v. Fletcher*, Douglas, 230.

³ In the case of *Valton v. National Ins. Co.*, 22 Barb. N. Y. 9, the question of whether a policy was a wager or not was held to be a point of law for the court. See *Witherell v. Maine Ins.*

Co., 49 Me. 200; *Eaton v. Smith*, 20 Pick. 150. Here the court held that when a word is used in a technical or peculiar sense, as applicable to any branch of business, or to any particular class of people, evidence of usage is admissible to explain and illustrate it, and that evidence is to be considered by a jury; and the province of the court then is to instruct the jury what will be the legal effect of the contract as they shall find the meaning of the word modified or explained by the usage. *Huckins v. Peoples' Ins. Co.*, 11 Foster, N. H. 238. In *Carter v. Boehm*, 3 Burr. 1905, Lord Mansfield left a question of the general construction to a jury. *Simond v. Boydell*, Doug. 255. In *Ougier v. Jennings*, 1 Campb. 505, n., the jury found a verdict as to a usage among underwriters. *Eyre v. Marine Ins. Co.*, 6 Whart. (Penn.) 247; *S. C. 5 Watts. & S. (Penn.) 116*. Whether or not a promissory note, which was given to a mutual-insurance company, was intended as a stock note or as an ordinary premium note, was held to be a question for the jury. *Bromver v. Hill*, 1 Sandf. 629. See also *Neve v. Columbian Ins. Co.*, 2 M'Mull.

There is a difference between the law in England and in this country as to the effect of the statute of limitations on the jurisdiction of courts of equity in matters that have been barred at law by the provisions of that statute. In England courts of equity do not hold themselves as absolutely barred by it, but they adopt it merely as a rule to guide the exercise of their discretion. In this country it is different, and equal weight and effect are attached to the statute in courts of equity and in those of law. Even in England, however, where, as we have said, the statute is more rigidly applied than here, in cases of bills filed for the reform of policies, or contracts of any kind, the courts will not grant relief if the period allowed by the statute has elapsed, between the filing of the bill and the time when the mistake to be corrected was discovered, or when, had reasonable care been exercised, it should have been discovered; and in this country the same doctrine has been enforced in the case of a marine policy.¹

C. C. 220; *Mutual Fire Ins. Co. v. Union Ins. Co.*, 1 Whart. (Penn.) 1399; *Marseilles*, 6 Ill. 237. In the case of *Fuller v. Alexander*, 1 Brev. S. C. 149; *Dodge Co. Mut. Ins. Co. v. Rogers*, 12 Walsh v. Washington Ins. Co., 32 N. Y. 427; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, S. C., reaffirmed 10 Pet. 507. Whether or not there was a compliance or a non-compliance with a representation, or whether or not there was a representation or concealment, is commonly a question for the jury. See *Livingston v. Delafield*, 1 Johns. 523; *Littledale v. Dixon*, 4 B. & P. 151; *Willes v. Glover*, 4 B. & P. 14; *Walden v. N. Y. Firemen's Ins. Co.*, 12 Johns. 128; *N. Y. Firemen's Ins. Co. v. Walden*, *ib.* 513; *Huguenin v. Rayley*, 6 Taunton, 186; *Percival v. Maine Ins. Co.*, 33 Me. 242; *Sexton v. Montgomery Ins. Co.*, 9 Barb. N. Y. 191; *Lyon v. Commercial Ins. Co.*, 2 Rob. La. 266.

¹ *Kennedy v. Dunclee*, 1 Gray, 65, 71.

In the case of *Clifford v. Hunter*, Mood. & M. 103, where the question of the sea-worthiness of a vessel occurred, Lord *Tenterden* said: "I think it is rather a question for the jury, whether the ship was competent for the voyage, than for me." See also *Prescott v.*

CHAPTER XII.

STAMPS.

STAMPS were required on policies of insurance, for the first time in this country, in 1862. But they have been required in England since the 5th of William and Mary (1693). The practical operation of this requirement has passed repeatedly under adjudication in England. Our stamp acts use similar, although not the same words with the English acts, and are intended to effect the same purposes; and in the brief time since they have been in force, our own courts have had little occasion or opportunity for passing upon questions arising under their provision as to policies. But as some, at least, of these questions are difficult, and have already, as we understand, given rise to some diversity of practice, we shall, after some consideration of the words of the statute, refer to English authorities.

The following is the clause of the act of the 13th of July, 1866, affecting marine insurance.

“On each policy of insurance or other instrument, by whatever name the same shall be called, by which insurance shall be made or renewed upon property of any description, whether against perils of the sea or by fire, or other peril of any kind, made by any insurance company, or its agents, or by any other company or person, the premium upon which does not exceed ten dollars, ten cents; exceeding ten, and not exceeding fifty dollars, twenty-five cents; exceeding fifty dollars, fifty cents.”

The English statute, 9 Geo. 4, ch. 18, prohibits the insurance against fire of detached buildings, &c., under one sum, because “such collective insurance has been made to effect the purpose of several separate and distinct insurances, to the manifest injury of his Majesty’s revenue.” And it provides that in any policy covering many buildings, “every such building shall be separately valued, and a distinct and separate sum shall be insured thereon.” This statute was made to carry into effect the purpose of an earlier statute, 55 Geo. 3, ch. 184, by which duties were imposed on policies of insurance against fire, at a certain rate on every

hundred pounds and the fractional parts of every insurance less than a hundred. But all this is confined to fire insurance. Nor do we know why a merchant and his insurer might not, if they saw fit, include many ships or cargoes in one policy, to save the cost of stamps. It can hardly be supposed, however, that so trifling an economy as this would induce such an effort. It would not only be troublesome at first, but would complicate the interests and risks in such a way as might cause far greater trouble in the settlement.

It must be remembered that this tax is laid on the policy of insurance, and not on the agreement or contract of insurance, and this consideration will help us to answer a question which has already risen in practice.

If, by an open or running policy, A B is insured a large sum on shipments to be hereafter made, reported to the insurers, and indorsed on the policy, no one of the shipments being yet made, should that policy now be stamped? On the one hand, it is said that there is nothing as yet for the policy to attach to, and never may be; and that, although the policy is subscribed and delivered, it is not yet a contract of insurance, but only a contract for future insurance on a contingency; and the stamp is imposed by law only "on a policy of insurance . . . by which insurance shall be made upon property"; and as yet the policy has not this effect. We think, however, this reasoning is too nice for practice. The policy itself is made; the premium note given; and in the chapter on Interest we have seen that it is a very common thing to effect insurance on property the title to which is not yet in the insured. Very many policies never attach, because the property to which it is intended and expected that they will attach never comes under the terms of the policy, or is exposed to the risks which the policy is intended to cover. Nor can we see that the above argument against the necessity of a stamp would apply in that case, unless it would apply to all policies until it was certainly known that they had attached to property. We are, therefore, of opinion that the stamp should be affixed when the policy is made. Here the contract is complete when the policy is delivered; and, when a shipment which comes within its terms is made and reported, the insured can require that it be indorsed; and the insurers could not discharge themselves from their liability by refusing to make the indorsement.

But open policies are now often made on terms materially different from these. The insurers reserve the right of fixing the rate of premium on each shipment as reported to them. And it seems to have been held by the Circuit Court of the United States for the district of Maryland, that the contract was, in such case, completed when the policy was made, and attached to each shipment when made, leaving the rate of premium to be adjusted by law or evidence if the parties did not agree. But the Supreme Court overruled this decision; and held that the insurers had reserved the right to complete the contract as to each shipment by an agreement as to the rate of premium; and, until this rate was agreed upon, the insurance did not attach to the shipment.¹ It would seem to follow from this ruling, that the policy was not so far completed as to require a stamp until a shipment was made, reported, and indorsed. Then a stamp should be affixed. And afterwards the question would arise, whether any successive shipment required a stamp when indorsed. This question is not without its difficulty. The stamp, we repeat, is imposed upon the policy of insurance, and not on the contract of insurance. And it might seem as if this requirement was satisfied and its force exhausted, when a stamp is put on the policy, if it be large enough to cover the whole amount of insurance which can be made under that policy. But this principle must not be carried too far. It certainly would not permit an escape from the Stamp Act in the case of a merchant who, having or expecting occasion to require many insurances, should seek to save all but one of the stamps by getting a policy for twenty years, on some vast sum, the several interests which he wished insured, ships, cargoes, or freights, to be thereafter reported and indorsed at premiums to be agreed upon as each interest was insured. And, on the whole, we should say, that, if the terms of the policy were such that no stamp was required or proper until a shipment was made, then every new shipment would require a new stamp when the bargain concerning it was completed.

Another reason for requiring these successive stamps may be found in the fact that the Stamp Act requires a stamp on every policy that shall be "made or renewed." If a policy which

¹ *Orient Mut. Ins. Co. v. Wright*, 23 Howard, 401. For a statement of this case, see *ante*, vol. 1, p. 321, n. 2.

expires at a certain time is, at that time, renewed by an indorsement, there can be no doubt that a new stamp is requisite. Now an indorsement, which not only makes a policy attach to this new shipment, but gives validity to the policy as a contract of insurance in relation to this shipment, may, with no great stretch of construction, be regarded as *renewing* the contract at each time.

Other questions arise as to the slip or agreement. The first of these is this: Is this agreement a policy under the Stamp Act? The English statute, 10 Anne, ch. 26, sect. 68, declares that "all deeds, instruments, and writings for payment of money, upon the loss of any ship or goods, or upon a loss by fire, or for any other purpose, and for which any writing commonly called a policy of assurance or insurance has been usually made, are to be deemed policies of insurance." It will be seen that this definition confines the name to a "writing commonly called a policy of insurance," which this slip certainly is not. Our Stamp Act says: "Policy of insurance, or other instrument, by whatever name the same shall be called, by which insurance shall be made," &c. Now it is true that, on the agreement expressed by the slip, especially if signed by the insurers, the insured may have his remedy in case of loss. But it must be by a bill in equity, requiring the insurers to make and deliver a policy, or by an action for damages for the breach of contract in not making a policy. The reason is, that the slip is considered, not a contract *of* insurance, but a contract *for* insurance. And on no ground can it be considered a policy in such a sense that it requires a stamp. The test of this may be found in the question, Would an insurance company, whose actuary or secretary signed such a slip, be liable for the penalty affixed to the offence of delivering a policy without a stamp? No one would assert this; although the English statute of 7 Vict. ch. 21, sect. 4 (repeating a provision in the 35 Geo. 3), referring to the practice of the two chartered companies of noting down the terms of intended insurance on unstamped labels or slips, exempts them from penalties only on condition that they make out the policies from them within three days.

But the next question is, If the slip be not stamped, and no policy be made and delivered, has the insured any remedy, or has he lost all remedy by the force of the Stamp Act? He brings his

proper action at law or in equity, and in support of it produces the slip. The objection is taken that it has no stamp. He answers, It is not a policy. But then it is replied, It is an *agreement*, and, not having the proper stamp, cannot be produced in court. This objection would seem to be fatal. In the English courts, for reasons which would seem equally applicable to our law, it is held that where a party relies upon an agreement which has been reduced to writing, he must prove it by that writing, and cannot so prove it if the paper be not stamped. And if an unstamped paper be lost or destroyed, he cannot prove its contents.¹ This rule was applied in one case where the defendant had snatched the paper out of the hands of the plaintiff's attorney before he could get it stamped, and destroyed it.²

¹ *Rogers v. McCarthy*, Sittings after Hil. Term, 1800, Park on Ins. (8th ed.) 39, S. C. 3 Esp. 106. In this case it appeared to be the custom for underwriters at Lloyd's Coffee-House to put down upon a slip of paper all the risks they had taken in the course of the day, and one of the special jury said that they considered the party as bound by that slip, though he never signed a policy. But Lord Kenyon held that, whatever obligation there might be in honor and good faith, he certainly would not be bound in law, for, in order to enforce the claim of the assured in a court of justice, he must produce a stamped policy. In *King v. Inhabitants of Castle Morton*, 3 B. & Ald. 588, it was held, that where an agreement in writing, unstamped, for the letting a tenement at a certain rent had been lost, parol evidence of its contents was not admissible for the sake of proving thereby the value of the tenement. See also *Marsden v. Reid*, 3 East, 572.

² *Rippiner v. Wright*, 2 B. & Ald. 478. This was an action of assumpsit for a crop of peas sold by the plaintiff to the defendant. At Nisi Prius the defendant proposed to give parol evi-

dence of an agreement between him and the plaintiff that the latter should not be paid for the value of the crop, but only for the expense of ploughing and seed sown. It appeared that this agreement had been reduced to writing on unstamped paper, and that afterwards the plaintiff took an opportunity to snatch it from the hands of the defendant's attorney and destroy it. The plaintiff objected that no parol evidence of the contents of this paper could be received, inasmuch as the paper itself could not, if in existence, have been read, owing to the want of a stamp. To this it was replied that the plaintiff, by destroying the paper, had prevented the defendant from getting it stamped, as he might have done on payment of the penalty, and that therefore it was not competent for him to make this objection. The evidence was rejected, and for this reason the defendant moved for a new trial; but the court said: "The evidence was properly rejected. It is the duty of the parties to an agreement to take care that when it is executed it is properly stamped; and it is one of the risks attendant upon an omission to do this, that, if any accident happens to

This question of the effect of an unstamped slip is not, however, without its difficulty. We have already seen that there is much reason for holding that a merely oral contract of insurance may be binding. Then, if, in an action on such a contract, the defendant proved that the agreement was written on a slip, and required its production, and when produced it was found to be inadmissible for want of a stamp, would the rules above stated be held applicable, and sufficient to exclude all evidence of the contract, or would the slip be considered a nullity, and the evidence received, as in the English case, where, an unstamped note from Jamaica being in suit, Lord Kenyon declared it inadmissible, but said the plaintiff might sue on a *quantum meruit*?¹ With all the severity of the English courts when the stamp acts come before them, there

the agreement before the stamp is affixed, there is no remedy upon it whatsoever. It is not possible now to say whether or not the commissioners of stamps, in the exercise of their discretion, would have permitted this agreement, if it had remained in existence, to be stamped on payment of the penalty."

¹ In *Aloes v. Hodgson*, 7 T. R. 241, the note was given by the master of a ship to a seaman, and was in this form: "Jamaica, 25th July, 1796. Three days after the arrival of the ship Neill Malcolm at London, I promise to pay to W. Aloes fifty guineas, if he does his duty as an able seaman. John Hodgson." There was no stamp on the paper, and the defendant gave in evidence a law of Jamaica, whereby a certain stamp was imposed on all inland bills of exchange and promissory and other notes, and contended that the paper in question, being void by that law, and not evidence in the country where it was made, could not be received in evidence in England. In behalf of the plaintiff, it was contended that the writing could not be declared on as a promissory note because not

negotiable, being a promise to pay on a contingency, but that it might be declared on as a special agreement; that the defendant should not be allowed to avail himself of an objection which was merely founded on a revenue law of a foreign country, and did not enter into the merits of the transaction between the parties. The plaintiff also relied upon a count on a *quantum meruit*. Lord Kenyon, Ch. J., decided the question as follows: "This is a promissory note, though not negotiable; and, as it is not stamped, it cannot be received in evidence. Then it is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made; and, unless it be good there, it is not obligatory in a court of law here. But as there is a count on a *quantum meruit*, which was not considered at the trial, and as the instrument could not be given in evidence for want of the stamp, there must be a new trial, in order to give the plaintiff an opportunity of recovering on the general count; therefore let there be a new trial."

are cases where unstamped agreements are received or their contents proved, which it would not be easy to separate from an action on an agreement to insure, by any very obvious line of distinction: as to prove usury;¹ to recover back a wager;² to prove fraud in the holder of the unstamped note;³ to rebut, by an unstamped bill, evidence of payment of a bill;⁴ to show an agreed statement of amounts as set forth in the unstamped agreement;⁵ to prove the receipt of money by means of an unstamped check;⁶ to prove partnership by an unstamped agreement of dissolution;⁷ to show to whom goods were sold (or rather, were not sold) by an unstamped receipted bill of parcels.⁸ Still, however, we are of opinion, that where the slip or written agreement was signed, and set forth the terms of the contract, and had no stamp, it would be very difficult for the insured to find an adequate remedy.

SECTION I. — *Of Alterations or Additions.*

OUR stamp acts contain no special provisions as to alterations of, or additions to, policies of insurance; whereas these provisions in

¹ *Nash v. Duncomb*, 1 Mood & Rob. 104.

² *Holmes v. Sixsmith*, 7 Exch. 802. In this case the plaintiff entered into a written agreement with a third party to race their horses upon certain terms, and he deposited the amount of his stake with the defendant. The race was run, and the plaintiff's horse was beaten; but he afterwards discovered that the whole transaction was a concocted fraud. In an action to recover back the stake, after notice given not to pay the amount over, it was held that the written instrument, although unstamped, was properly admitted in evidence in proof of the fraud. *Pollock, C. B.*, said: "I think that an agreement does not require a stamp, unless it is used *as and for an agreement*. If it is used merely as part of the machinery of a fraud, and to show that the person paying money has been imposed upon, no stamp is necessary. In civil cases, if a document is used as

an agreement, it must be stamped, but not so if it is used for any collateral purpose, — if, for example, it be used as a piece of paper merely to identify some person by its having been found in his possession, or to connect one person with another, or to connect two pieces of paper together. And in criminal cases, although an instrument might, as such, unquestionably require a stamp, and be in itself free from fraud, still, if used to establish crime, it does not require a stamp: as, where a prisoner is indicted for forgery, the forged instrument is receivable in evidence, though it has either no stamp or a wrong stamp."

³ *Gregory v. Fraser*, 3 Campb. 454.

⁴ *Smart v. Nokes*, 7 Scott, N. R. 786.

⁵ *Matheson v. Ross*, 2 H. of L. 286.

⁶ *Blair v. Bromley*, 5 Hare, 542; *S. C.*

⁷ *Phillips*, 354.

⁸ *Wheldon v. Matthews*, 2 Chitty, 399.

⁹ *Millen v. Dent*, 10 Ad. & El, N. S. (Q. B.) 845.

the English acts are quite minute. But they all proceed, and are construed in the cases arising under them, upon a principle which must have force here without special enactment. It is, that an alteration or addition which makes a substantially new bargain makes a new policy. It is obvious that no parties would be permitted to use an old and exhausted policy over and over again without restamping, by merely changing the descriptions of the interests assured, or the parties or voyage. Where, then, can the line be drawn? Nowhere, unless, as we have already said, between those alterations and additions which do, and those which do not, make a bargain which is in substance a new one.

Thus, an instrument may be altered, by consent of parties, where it is only to correct a mistake;¹ or where it has not yet exhausted its work or discharged its functions, and the alteration is not intended to vary them;² or where, say the courts, the matter is still *in fieri*:³ and in these cases no new stamp is required.

It would seem to be clear that the character or effect of any addition or alteration, and whether it was material in the sense and to the extent of requiring a new stamp, must be a question of law for the court. The general question, whether alterations in an instrument (without reference to the Stamp Act) are material, is certainly one of law.⁴

As the want of a stamp, when an alteration seeming to require it is made, will be supplied by evidence that the alteration was made before the instrument was delivered, and while it was yet *in fieri*,

¹ *Kershaw v. Cox*, 3 Esp. 246. In this case a bill of exchange was put into circulation by indorsement, though it wanted the words "or order." These words were afterwards inserted by the drawer with the consent of the parties, and this was held not to vitiate the instrument, nor to make a new stamp necessary, as it did not make it a new instrument, but was merely the correction of a mistake, and in furtherance of the original intention of the parties.

² *Callow v. Lawrence*, 3 M. & S. 95.

³ *Webber v. Maddocks*, 3 Campb. 1; *Brutt v. Pickard*, Ry. & M. 37.

⁴ *Steele's Lessee v. Spencer*, 1 Pet.

552, 560. Where the admissibility of a bill of exchange, purporting to be a foreign bill, and stamped accordingly, was objected to on the ground that, although it purported to be drawn abroad, it was in fact an inland bill, drawn in London, and evidence was offered to prove that fact, it was held that the judge ought to have received the evidence in that stage of the cause, and decided upon the admissibility of the instrument, and not to have received the evidence afterwards, as part of the defendant's case, and submitted it to the jury. *Bartlett v. Smith*, 11 M. & W.

483.

the burden of proof that it was then made would seem to rest on the party who must make use of the instrument.¹

In one case Lord Ellenborough held, that an alteration extending the time of sailing did not require a new stamp.² And a memorandum cancelling a warranty of the time of sailing did not require a new stamp.³ But in another case, at very nearly the same time, the same judge held that an alteration of "on ship and outfit" into "on ship and goods" required a new stamp.⁴ Where

¹ Where an alteration appears upon the face of a bill, the party producing it must show that the alteration was made with consent of parties, or before the issuing of the bill. *Henman v. Dickinson*, 5 Bing. 183. In this case, *Park, J.*, said: "Where the plaintiff sues on an instrument which has manifestly been altered, it is for him to show that the alteration was not improperly made. I am sure this has been decided, and good sense points out that it ought to be so, because the defendant can have no means of knowing the circumstances of a subsequent alteration." In *Knight v. Clements*, 8 Ad. & El. 215, a bill was drawn upon a two months' stamp, and had begun with the words, "Three months after date," but the word "three" had been obliterated (as if blotted while the ink was wet), and "two" written upon it, and "two" written again underneath, and the plaintiff, who put in the bill at *nisi prius*, offered no evidence to account for these alterations. It was held that the document, by itself, was no evidence to go to the jury of the alterations having been made at the original writing of the bill, and, issue having been joined on a plea of *non accepit*, that the plaintiff must be non-suited. Lord *Denman*, Ch. J., said: "The plaintiff was bound to prove a bill accepted payable at two months: that which he produced was accepted, payable either at two or three months,

with no evidence whether it was the one or the other. The mode of obliteration might have furnished arguments in favor of one or the other supposition, and material confirmation to any proof adduced as to that fact. But, standing by itself, it was obviously no better than a conjecture; for the alteration might have been too late, and accompanied with a fresh marking by wet ink rubbed over on the instant." See also *Clifford v. Parker*, 2 Man. & G. 909.

² *Kensington v. Inglis*, 8 East, 273. Here, goods and specie, to a certain amount, were insured by a policy on ship, or ships, which should sail on the voyage insured between October 1, 1799, and June 1, 1800. A memorandum was written, on the policy, on the 11th of June, extending the time of sailing to the 1st of August, 1800. It was held, by Lord *Ellenborough*, that this did not require a stamp, being within the thirteenth section of the statute 35 Geo. 3, ch. 63, which provides that the act imposing the stamp shall not extend to prohibit the making of any lawful alteration in the terms or conditions of any policy, &c.

³ *Ridsdale v. Shedden*, 4 Campb. 107.

⁴ *Hill v. Patten*, 8 East, 373. The policy was upon "ship and outfit," on a voyage upon the southern whale fishery out and home, and the alteration was made by consent of the underwriters after the ship had sailed upon the voy-

the port to which the vessel was to go was altered, this required no new stamp.¹ And a memorandum rectifying the declaration by a broker of a ship in an open policy required no new stamp.²

age insured, and after the policy had fully attached to what was, at the time of such sailing, the subject insured. It was held that, outfit being essentially different in such a voyage from goods, the alteration was therefore not within the exception of the statute 35 Geo. 3, ch. 63, sect. 13, which enables alterations to be made in the terms or conditions of a policy, without having a new stamp, so that the thing insured remains the property of the same person, &c.

¹ *Ramstrom v. Bell*, 5 M. & S. 267. The policy was on goods at and from Stockholm to Swinemunde. The ship being driven by stress of weather into Misby, on the 30th of May, and detained there till the 9th of October, the assured, on the 1st of July, wrote to their agents in London, "that the captain had been ordered to proceed to Königsberg, as they were not certain whether the enemy might be at Swinemunde or not, and that the passage to Königsberg was nearly the same, but rather the shortest and safest; and they desired the agents to arrange the matter with the underwriters"; which letter the agents receiving, on the 12th of July, applied to the underwriters for their consent to alter the policy by adding the words "Königsberg or Memel" after "Swinemunde," which consent was obtained; and the ship and goods were afterwards lost in their voyage to Königsberg. Lord *Ellenborough*, Ch. J., said: "The assured had a purpose of change arising *ex justa causa*, and while it was in contemplation the proposal was made to the underwriter, and assented to by him, that Königsberg should be the ship's destination. If the underwriter had not assented, the as-

sured might have thrown the risk upon him by going to Swinemunde; instead of which, the application is made for the underwriter's benefit. The act [35 Geo. 3, ch. 63, sect. 13, as to alterations not requiring a new stamp] says: 'So that the alteration be made before notice of the determination of the risk.' This alteration was made while there was only an intention to determine the risk."

In *Brockelbank v. Sugrue*, 1 B. & Ad. 81, a policy duly stamped was effected on a ship on a voyage at and from Liverpool to Quebec. The ship being detained beyond the intended time of sailing, the following memorandum was indorsed on the policy: "The Hebe being unavoidably detained beyond the intended time of sailing to Quebec, the voyage is changed, and the vessel proceeds from Liverpool to St. John's, New Brunswick, at and from thence back to London; and, in consideration of one guinea per cent additional, the underwriters agree to continue on the risk until the vessel should be arrived back in London, or her port of discharge in the United Kingdom." It was held that the change of destination of the ship provided for by the memorandum was an alteration in the terms and conditions of the policy within the meaning of the 35 Geo. 3, ch. 63, sect. 13, and therefore that the policy so altered by the memorandum did not require a new stamp.

² *Robinson v. Touray*, 3 Campb. 158, S. C. 1 M. & S. 217. Here there was a policy on goods by ship or ships to be thereafter declared. The broker by mistake made a written declaration upon goods by wrong ships, the Tweende

And an alteration from "on ship" to "goods as interest may appear," was held to require no new stamp.¹ But it is not very easy to see clearly why the stamp should be excused where this mistake was corrected, and required where the mistake of "outfits" for "goods" was corrected.²

In this last case, as the action could not be maintained on the policy as altered for want of a stamp, another action was brought on the policy as unaltered. But the court held that the alteration was effectual to defeat an action on the policy as unaltered.³

Venner and the *Neptunus*, to which the underwriters put their initials. It was held that he might afterwards, in compliance with the orders of the insured, declare upon goods by the right ship, the *America*, without the assent of the underwriters and without a fresh stamp. Lord *Ellenborough* said: "There was here a blunder in the names of the ships first declared. If this was without fraud and without prejudice to the underwriters, I think it might be corrected without the assent of the defendant, and without a fresh stamp. It is the same as if a verbal message had been sent by a porter who misdelivered it. The first declaration did not form any part of the contract. It was a corrigible mistake, and it was corrected. The policy therefore attached upon the cargo of the *America* in the same manner as if no prior declaration had been made."

¹ *Sawtell v. Loudon*, 5 Taunt. 359. The broker was directed to effect a policy upon goods by a certain ship. By mistake, he effected it upon the ship, his principal having no interest therein. The error was discovered after the sailing of the ship, and, on application to the insurers, was rectified by a memorandum in the margin stating the terms. It was held that no new stamp was required, as the first policy upon the goods was a mistake.

² *Hill v. Patten*, 8 East, 373, *supra*, p. 558, n. 2.

³ *French v. Patton*, 9 East, 351. Speaking of the change, in the policy, from "ship and outfit" to "ship and goods," Lord *Ellenborough* said: "The new agreement was complete, as far as the will of the parties could make it so; and it only wanted a circumstance which the law requires to give it its full legal effect. But though ineffectual as an instrument to sue on, it seems effectual to do away the former agreement, which was thereby abandoned. If this were otherwise, would it not operate as a fraud on the revenue? I am glad, however, that this case comes before us on a nonsuit, because the plaintiff will not be concluded by our present opinion. I have turned the question in my mind again and again, with great anxiety. In the first action, the plaintiff insisted on the alteration as made, agreeably to the real intentions of the parties; and that the policy, as it was first subscribed, was contrary to the instructions of the broker, and by mistake. But now he desires us to consider that it was not altered, because it was not effectually altered, for want of a new stamp to the memorandum. But is it not made a different policy by the memorandum, by which the act of the parties in lieu of the former

In one English case, turning on the question whether more than one stamp was required because the instrument included parties with distinct and separable interests, all the underwriters of a marine policy having agreed, by an instrument having but one stamp, to refer a disputed question to arbitrators, it was held, but apparently with some difficulty, that the single stamp was sufficient.¹

one, which they abandon? Is it less effectual to show the intention of the parties, because it is a fraud, in law, against the revenue? The plaintiff's own act has made, as far as he can make, the policy speak a different language from what he now insists that it does, and he must take the consequences. I cannot, therefore, say that the policy is not so altered as to have lost its original identity, though the circumstance of a stamp be wanting to give full effect to the instrument so altered; and I do not think that the plaintiff can recur to it again in its original state. If, however, he shall be advised to question our opinion, I am glad that the opportunity will still be open to him." *Le Blanc*, J., added: "We must give the rule of law, in this case, as far as we are compelled to do it, with reluctance, because it is against a party who, perhaps, meant to do no wrong at the time; but can the court enforce an agreement, after the parties themselves have, upon the very face of the same instrument, declared that it is not their agreement, and have actually written another and a different agreement in the place of it?"

¹ *Goodson v. Forbes*, 6 Taunt. 171, S. C. 1 Marsh. 525. Here there were

two actions on a policy of insurance, and the declarations contained also a count upon an award made under a reference by the plaintiff on the one hand, and all the underwriters on the policy on the other. Upon the trial at *nisi prius*, it appeared that the agreement to refer and the award were each written on one stamp. To this the defendant objected, that as many stamps were requisite as there were underwriters. The evidence, however, was admitted, and a verdict was rendered for the plaintiff, subject to the point reserved. Upon the point in question, *Gibbs*, C. J., in giving the opinion of the court, said: "We think it impossible to decide that, in the present case, more stamps than one were necessary, without disturbing decided cases." It was admitted by the counsel for the defendant that, in a case of composition by an insolvent debtor with his creditors, only one stamp is necessary. There the different creditors have each a separate remedy against the insolvent debtor. They have no joint legal interest; yet it has been always considered that upon such a deed one stamp is sufficient. Such deeds have always been received in evidence.

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